

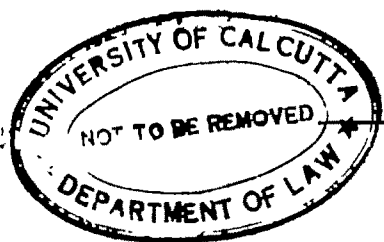
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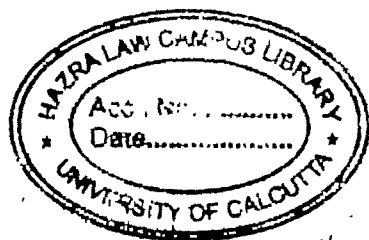
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DECIDED  
BY THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL ON APPEALS  
FROM INDIA,  
BY THE FEDERAL COURT  
AND  
BY THE HIGH COURT OF JUDICATURE AT  
FORT WILLIAM IN BENGAL.

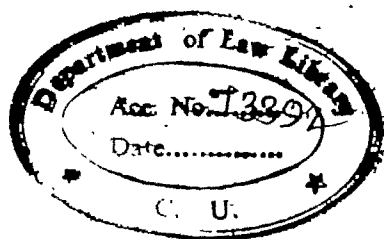


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# JUDGES OF THE HIGH COURT.

1944.

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## Chief Justice.

The Hon'ble Sir Harold Derbyshire, Kt., K. C., M. C.

The Hon'ble Sir Torrick Ameer Ali, Kt. (*Acting*).

## Puisne Judges.

The Hon'ble Mr. Justice Torick Ameer Ali, Kt.

- " G. D. Mc Nair, Kt.
- " Syed Nasim Ali, M. A., B. L.
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- " B. K. Mukherjee, M. A., D. L.
- " C. C. Biswas, M. A., B. L., I. C. S.
- " R. F. Lodge, B. A., I. C. S.
- " F. W. Gentle.
- " A. N. Sen.
- " T. J. Y. Roxburgh, C. L. E., I. C. S.
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- " S. R. Das.
- " A. L. Blank, I. C. S.
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- " E. C. Ormond.
- " A. S. M. Latifur Rahman, M. A. (Cantab).
- " T. H. Ellis, I. C. S. (*Offg.*).

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I

## FEDERAL COURT.

PRESENT: *Sir Patrick Spens, Knight, Chief Justice,*  
*Mr. Justice S. Varadachariar and Mr.*  
*Justice Zafrulla Khan.*

BASANTA CHANDRA GHOSE

THE KING-EMPEROR.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE  
AT PATNA.]

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January, 19.

*Detenus—Detention of—Criminal Procedure Code (Act V of 1898), section 491, application under—Ordinance No. III of 1944, if ultra vires the Governor-General—Legislation relating to prosecution of war—Ordinance No. III of 1944, clause (11), if valid—Acting prejudicially to the maintenance of public order and the efficient prosecution of war—Order, proof of—Constitution Act, 1935, sections 59(2), 93—Ordinance No. III of 1944, section 11 clause (2)—Burden of proof—Proof to the contrary—Challenging the factum or bona fides of the order—Mala fides—Cancellation of previous order—Earlier order of detention defective on formal grounds—Proper order of detention on pre-existing grounds—Order of detention, if can be made against a person who is already under detention—Analogy of civil proceedings to Habeas Corpus proceedings—Validating order.*

Ordinance No. III of 1944 is not *ultra vires* the Governor-General as to authorising detention on the ground that the detenus is likely to act in a manner prejudicial to the efficient prosecution of the war.

The legislation relating to the prosecution of war is within the subject specified in Entry No. 1 in List I. The reference to "the efficient prosecution of the war" in Ordinance No. III of 1944 as well as in the order of detention is to be understood in the light of the circumstances in which the Ordinance came to be passed.

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Clause 11 of the Ordinance-No. III of 1944 is not invalid in so far as it prohibits certain matters being adduced in evidence during the currency of the Ordinance.

It is open to the detainee to show that the order of detention on the ground that it was necessary so to do with a view to preventing him from acting in a manner prejudicial to the maintenance of public order and the efficient prosecution of the war was not in fact made by the Governor or that it was a fraudulent exercise of the power. The burden of substantiating these pleas lies on the detainee.

*Liversidge v. Anderson* (1), and *Green v. Secretary of State for Home Affairs* (2).

As regards proof of the orders, there is nothing in the proclamation under section 93 of the Constitution Act to exclude the application of section 59(2) of the said Act or clause 10(3) of the Ordinance.

The mere fact that the detainee challenges the factum or the *bona fides* of the order or the fact that the Officers of the Government must naturally be in possession of information on the subject is not "proof to the contrary" so as to make it incumbent on the Government to adduce evidence in support of the order.

*Green v. Secretary of State for Home Affairs* (2) referred to.

*Ren v. Carr-Briant* (3) distinguished.

The fact of cancellation of the order of 19th March, 1944 by the order of 3rd July, 1944 and the passing of a fresh order of detention on the 3rd July, 1944 does not show *mala fides*.

Where the earlier order of detention is held defective merely on formal grounds there is nothing to preclude a proper order of detention being based on the pre-existing grounds themselves, especially in cases in which the sufficiency of the grounds is not examinable by the Courts.

An order of detention can be passed against a person who is already under detention :

*Kamla Kant Asad v. King-Emperor* (4).

The analogy of civil proceedings in which the rights of parties have ordinarily to be ascertained as on the date of the institution of the proceedings cannot be invoked in proceedings in the nature of Habeas Corpus.

If at any time before the Court directs the release of the detainees, a valid order directing his detention is produced, the Court cannot direct his release merely on the ground that at some prior stage there was no valid cause for detention. The question is not whether the later order validates the earlier detention but whether in the face of the later valid order the Court can direct the release of the petitioner.

Federal Court Criminal Appeal No. XII of 1944.

(1) [1942] A. C. 206.

(2) [1942] A. C. 284.

(3) L. R. [1943] 1 K. B. 607.

(4) (1944) 1 L. R. 23 Pat. 252.

*Mr. S. C. Ghose, Advocate, Federal Court, with Mr. B. C. De, Advocate, Patna High Court, instructed by Mr. Gurudayal Sahay, Agent, for the Appellant.*

*Sir Brojendra Mitter, Advocate-General of India (Mr. H. K. Bose, Advocate, Federal Court, with him) instructed by Mr. K. Y. Bhandarkar, Agent. Mr. Mahabir Prasad, Advocate-General of Bihar, (Mr. R. J. Bahadur, Advocate, Federal Court, with him) instructed by Mr. S. P. Varma, Agent, for the Respondent.*

The judgment of the Court was delivered by

**Spens, C. J. :—**This is an appeal by a detainee against an order of the High Court at Patna dismissing his application under S. 491 of the Criminal Procedure Code. The appellant was arrested on the 27th March 1942 under an order dated 19th March 1942 purporting to be made by the Governor of Bihar in exercise of the powers conferred by rule 26 of the Defence of India Rules. The application under S. 491 was filed on 28th April 1943. For one reason or another, the hearing of the application was delayed till February 1944 and in the meanwhile Ordinance III of 1944 was promulgated on the 15th January 1944. The application was dismissed by the High Court; but on appeal, this Court held that the new Ordinance (Ordinance No. III of 1944) did not take away the power of the High Court to deal with the matter and accordingly remitted the case to the High Court with a direction that the petition be restored to the file and disposed of in due course of law. The order of this Court was passed on the 23rd May 1944. On the 3rd July 1944 the Governor of Bihar passed two orders, Nos. 3928-C and 3929-C. By the first, he cancelled the order of detention dated 19th March 1942 and by the second, he directed the detention of the appellant on the ground that it was necessary so to do with a view to preventing him from acting in a manner prejudicial to the maintenance of public order and the efficient prosecution of the war. When the application again came on for hearing before the High Court, reliance was placed by the Advocate-General of Bihar on the order of the 3rd July 1944 and he contended that it was unnecessary in the circumstances to enquire into the validity of the order of 19th March 1942. Objection was taken on behalf of the detainee to this course and the validity of the orders of the 19th March 1942 and 3rd July 1944 was questioned on various grounds. These contentions were discussed at considerable length by the learned

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Judges of the High Court and they held that the objections were untenable; the petition was accordingly dismissed. Hence the appeal.

Two constitutional points were urged before us. The first was to the effect that Ordinance No. III of 1944 was *ultra vires* to the Governor-General in so far as it purported to authorise detention on the ground that the detenué was likely to act in a manner prejudicial to the efficient prosecution of the war. It was contended that legislation relating to the prosecution of war was not within the ambit of any of the lists in Schedule VII to the Constitution Act and that therefore neither the Indian Legislature nor the Governor-General's Ordinance-making authority was competent to legislate in respect of that topic. It was recognised that "preventive detention on the grounds of State connected with defence" was a subject specified in entry No. 1 in List I but it was urged that it could not be assumed that the prosecution of the war was necessarily a matter of defence and that the war may in certain circumstances be a matter of aggression or conquest. We are of the opinion that there is no force in this contention. The reference to "the efficient prosecution of the war" in the Ordinance as well as in the order of detention must be understood in the light of the circumstances which the Ordinance came to be passed. The language of the Ordinance is only a repetition of the language of S. 2 of the Defence of India Act and that Act begins by referring to the proclamation of the Governor-General under S. 102 of the Constitution Act to the effect that the security of India is threatened by the war. Events of which the Court is entitled to take judicial notice were happening in 1942, 1943 and 1944 with reference to which it could clearly be postulated that the efficient prosecution of the war was necessary for the defence of India.

It was next contended that Cl. 11 of the Ordinance was invalid in so far as it precluded certain matters being adduced in evidence. It was said that this was in effect an attempt to repeal certain provisions of the Evidence Act and it was not within the power of the Governor-General to do so by an Ordinance. This contention is misconceived. It was admitted that it was within the power of the Governor-General to enact such a provision in force during the time that the Ordinance itself was in force. What was contended was that he had no power to affect the provisions of the Evidence Act permanently. Clause 11 of the Ordinance does not purport to do so. Its words are general and the utmost that could be said is that if the prohibition ensues

it were sought to be enforced after the expiry of the Ordinance, a question might arise as to whether the prohibition would then remain in force. But that is no ground for holding that the clause is invalid even in so far as it prohibits certain things being done during the currency of the Ordinance. Objection was also taken to the validity of sub-clause (2) of Cl. 11. It was contended on the authority of *Chester v. Bateson* (1) that such a provision could not be said to be for the peace and good Government of British India and could not therefore be held to be authorised by S. 72 of the Ninth Schedule to the Constitution Act. It is unnecessary for the decision of this case to deal with this question even if it were open to the Court to examine the correctness of the decision of the Governor-General as to the requirements of any particular situation.

With the leave of the Court, a number of contentions relating to other aspects of the case were urged before us. As we are of the opinion that there is no substance in any of these contentions, they may be briefly dealt with. It was broadly maintained that neither the order of 19th March 1942 nor the order of 3rd July 1944 was a *bona fide* exercise of the power entrusted to the Governor and that they were passed for other ulterior ends unconnected with the maintenance of public order or the efficient prosecution of the war. It was urged that as the detinue challenged the *bona fides* of the order and as the reasons and circumstances relating thereto were wholly within the knowledge of the officers of Government, it was incumbent upon the Crown to examine these officers to establish the *bona fide* character of the order and that as they have not been examined the Court must draw the inference that the order was not made in the *bona fide* exercise of the power. It was even contended that after the proclamation under S. 93 of the Constitution Act, the Crown was no longer entitled to rely on S. 59(2) of that Act and Cl. 10(3) of Ordinance III of 1944 and that the order of the 3rd July 1944 should therefore be formally proved. A complaint was also made that the High Court acted improperly in dismissing the application of the detinue to summon Mr. Houlton, the Chief Secretary to the Government of Bihar, who had signed the orders of the 3rd July 1944. This line of argument is in our opinion untenable. It was no doubt open to the detinue to show that the order was not in fact made by the Governor of Bihar or that it was a fraudulent exercise of the

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power. The observations in *Liversidge v. Anderson* (1) and *Green v. Secretary of State for Home Affairs* (2) establish that the burden of substantiating these pleas lies on the detenue. In the words of Viscount Maugham, once the order is proved or admitted "it must be taken *prima facie*, that is until the contrary is proved, to have been properly made and that the requisite as to the belief of the Secretary of State (here, the Governor) was complied with". As regards proof of the orders, we find nothing in the proclamation under S. 93 to exclude the application of S. 59(2) of the Constitution Act or CL 10(3) of the Ordinance. The proclamation suspends only so much of S. 59 as requires "consultation with the minister". The mere fact that the detenue challenges the factum or the *bona fides* of the order or the fact that the officers of Government must naturally be in possession of information on the subject cannot be said to be "proof to the contrary" so as to make it incumbent on the Government to adduce evidence in support of the order. In *Green's case* (2), Goddard L. J. (as he then was) referred to the possible ignorance of the detenue as to the reasons for his internment and said that that would not shift the burden of proof, because "it in no way shows that the Secretary of State had not reasonable cause to believe or did not believe that it was necessary to detain the person. Reference was made to *Rex v. Carr-Briant* (3) as to the extent of the proof required to rebut the presumption in such cases, but as no proof whatever is forthcoming in this case, no question of quantum of proof arises. The detenue no doubt made some sweeping assertions in his affidavits but no materials or sources of information with reference to which these assertions were made were disclosed in the affidavits. No value can therefore be attached to these assertions. Even these affidavits did not assert that the orders of the 3rd July 1944 were not in fact made by the Governor. As regards the detenue's application to summon Mr. Hopton, it was certainly within the discretion of the learned Judges of the High Court to dismiss it, if they considered that it was only an attempt to fish for information that might be turned to some account by the detenue. To permit such a device would practically be to allow the rule as to the onus of proof to be circumvented.

It was next contended that the very fact of the cancellation of the order of 19th March 1942 by the order of the 3rd July 1944

(1) (1942) A. C. 206.

(2) (1942) A. C. 284.

(3) L. R. (1943) I K. B. 607.



and the passing of a fresh order of detention on the 3rd of July 1944 showed *mala fides*. It was said that the orders of the 3rd July 1944 were passed pending the further hearing before the High Court, in order to burke an enquiry into the circumstances connected with the order of March 1942. We are unable to draw any such inference from the sequence of these orders. Reports of the decisions of this Court and of the High Courts show that during 1943 and 1944 different views were held in different quarters as to the formalities necessary for a valid order of detention and as to the authority entitled to pass such an order. If in view of possible defects of this kind in connection with the order of 19th March 1942 a fresh order of detention was passed in July 1944 so as to avoid any argument based on such defects, such a course will not justify any inference of fraud or abuse of power.

It was next argued as a matter of law that once the order of 19th March 1942 had been cancelled, there was no power to pass a fresh order of detention except on fresh materials and it was contended that the learned Judges of the High Courts were not justified in presuming that fresh materials must have existed when the order of July 1944 was made. The first step in this argument seems to us unwarranted. The observations of the Court of Appeal in *R. v. Home Secretary, Ex-parte Budd*, (1) show that in this broad form the proposition is untenable. It may be that in cases in which it is open to the Court to examine the validity of the grounds of detention a decision that certain alleged grounds did not warrant a detention will preclude further detention on the same grounds. But where the earlier order of detention is held defective merely on formal grounds there is nothing to preclude a proper order of detention being based on the pre-existing grounds themselves, especially in cases in which the sufficiency of the grounds is not examinable by the Courts. There is equally no force in the contention that no order of detention can be passed against a person who is already under detention. The decision of the Patna High Court in *Kamla Kant Asad v. King-Emperor* (2) cannot be understood as laying down any such proposition as a general proposition of law. The learned Judges seem to have drawn an inference of fact from the circumstances of the case that the order then in question was not one made in the *bona fide* exercise of the Governor's powers.

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It was finally contended that as the previous order of this Court directed an enquiry into the validity of the detention under the order of the 19th March 1942, the decision of the High Court must be limited to that question and that it was not open to the High Court to base its decision on the subsequent order of the 3rd July 1944. This contention proceeds on a misapprehension of the nature of *Habeas Corpus* proceedings. The analogy of civil proceedings in which the rights of parties have ordinarily to be ascertained as on the date of the institution of the proceedings cannot be invoked here. If at any time before the Court directs the release of the detainee, a valid order directing his detention is produced, the Court cannot direct his release merely on the ground that at some prior stage there was no valid cause for detention. The question is not whether the later order validates the earlier detention but whether in the face of the later valid order the Court can direct the release of the petitioner.

The appeal fails and is dismissed.

A. T. M.

*Appeal dismissed.*

PRESENT: *Sir Patrick Spens, Knight, Chief Justice,*  
*Mr. Justice S. Varadachariar, and Mr.*  
*Justice Zafrulla Khan.*

BASDEO AGARWALLA

v.

THE KING-EMPEROR.

F. C.

1945.

January, 19.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE  
AT FORT WILLIAM IN BENGAL.]

*Sanction—Drugs Control Order, 1943, section 16—Provision to be strictly observed—Prosecution instituted prior to the giving of sanction—Proceedings, if null and void.*

Where special statutory powers are conferred and specific provision is made in the statute as to the manner in which the powers are to be exercised, they should be exercised by the authority and in the manner specified in the statute and in strict conformity with the provisions thereof; *Sibnath Banerjee's case* (1).

(1) [1944] F. C. R. 1.

As clause 16 of the Drugs Control Order, 1943, authorises the previous sanction of the Provincial Government no valid objection can be taken to the form of sanction given under that clause for prosecution under sub-rule (4) of section 81 of the Defence of India Rules to the effect, that the form did not comply with the provisions of sections 49 and 59 of the Government of India Act, 1935.

The words of clause 16 of the Drugs Control Order, 1943 are imperative and it is essential that the provisions should be observed with complete strictness and where prosecutions have been initiated without the requisite sanction, that they should be regarded as completely null and void, and if sanction is subsequently given, that new proceeding should be commenced *ab initio*.

The prosecution in this case was instituted without the previous sanction required by clause 16 of the Drugs Control Order, 1943, and it is not possible to sever the proceedings prior to the date of grant of sanction from those occurring on and after that date :

*Held*, that when the sanction was obtained, no new start was made, the whole proceedings in this case were null and void.

Federal Court Criminal Appeal No. XVI of 1944.

The material facts will appear from the judgment.

*Mr. Mahabir Prasad, Senior Advocate, Federal Court, (Messrs. Samarendra Nath Mukherjee and R. J. Bahadur, Advocates, Federal Court, with him) instructed by Mr. N. R. Bose, Agent, for the Appellant.*

*Sir B. L. Mitter, Senior Advocate, Federal Court (Mr. H. K. Bose, Advocate, Federal Court, with him) instructed, by Mr. B. Banerji, Agent, for the Respondent.*

The judgment of the Court was delivered by

**Spens, C. J. :—**The appellant in this case was charged with two offences alleged to have been committed on the 20th April, 1944, contravening the provisions of clauses 9(a) and 13(d) of the Drugs Control Order, 1943. He was convicted on the 29th June, 1944 and sentenced to a term of four months' rigorous imprisonment and a fine of Rs. 1,000, or in default to a further term of four months' rigorous imprisonment. Against this conviction he appealed to the High Court of Judicature at Fort William in Bengal, and on the 13th November, 1944, his appeal was dismissed, although the sentence of imprisonment was reduced from four months to one month. A certificate under section 205 of the Government of India Act, 1935, was granted and hence the appeal to this Court.

The Drugs Control Order, 1943, provides by clause 16 as follows:—

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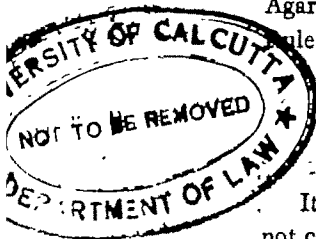
"No prosecution for any contravention of the provisions of this Order shall be instituted without the previous sanction of the Provincial Government....."

In purported compliance with the provisions of clause 16, the Provincial Government of Bengal made an order sanctioning the prosecution of the appellant by a document dated the 23rd May, 1944, in the following terms:—

"Whereas it appears from a report of the Deputy Commissioner of Police, Enforcement Department Calcutta that .....Basudev Agarwalla, son of Anandaram Agarwalla,.....of 185 Harrison Road, Calcutta, c/o Messrs. Umashankar & Co., Ltd., sold on 20th April 1944, 6 x 1 c. c. ampoules of Emetine Hydrochloride containing 1 gr. each to Babu H. N. Roy, Sub-Inspector of Excise employed on drugs control work for Rs. 13 in contravention of clause 9 of the Drugs Control Order 1943, the Provincial Government, in exercise of the power conferred by clause 16 of the said order sanction the prosecution of the aforesaid.....Basudev Agarwalla under sub-rule (4) of rule 81 of the Defence of India Rules.

(Sp.) S. BANERJEE,

*Secretary to Government of Bengal."*



It was argued before us that the sanction in the above form did not comply with the provisions of sections 49 and 59 of the Government of India Act, 1935. It was suggested that under those sections the sanction must be expressed to be given by the Governor and that it was improper that the Provincial Government should have purported to sanction the prosecution. This argument was apparently based on what were assumed to have been the views of the majority of this Court in *Sibnath Banerjee's* case (1). But as pointed out in that case where special statutory powers are conferred and specific provision is made in the statute as to the manner in which the powers are to be exercised, they should be exercised by the authority and in the manner specified in the statute and in strict conformity with the provisions thereof. In this case the provisions of clause 16 expressly authorise the previous sanction of the Provincial Government, and accordingly in our judgment no valid objection can be taken to the form of the sanction purported to be given in this case.

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It was then argued that on the facts of this case the prosecution had been instituted prior to the giving of the sanction in question and that accordingly having regard to the very definite provisions of clause 16, the proceedings and conviction must be null and void.

From the Order Sheet of the Chief Presidency Magistrate's Record it appears that the appellant was produced before the Chief Presidency Magistrate on the 2nd May, 1944, and a challan under rules 81(4) and 121 D. I. R. filed on that day. Thereupon the Chief Presidency Magistrate made an order transferring the case to another Magistrate. Later, on the same day the appellant was brought before that Magistrate who adjourned the case to the 16th May, 1944, for evidence and made an order directing that the appellant should give bail in Rs. 200 to appear on the 16th May. On the 16th May it was noted on the Order Sheet that sanction had not been received. None the less the Magistrate made further orders directing that the case be adjourned to the 24th May for evidence, that the prosecution witnesses be summoned for that day and for bail as before. Against the entry of the 24th May, 1944, a note appears in the margin of the record "sanction filed", and the entry proceeds to record that three prosecution witnesses were examined and a further adjournment ordered. Thereafter the case is recorded as proceeding in the usual way up to conviction and sentence on the 29th June, 1944.

From this it is clear that the sanction was not filed until the 24th May, 1944, but that in the meantime from the 2nd May onwards, the prosecution had been put in motion and various steps taken by the Magistrates. It would appear that when the absence of sanction was noted, it was considered to be a matter of little importance, which it could be assumed would be put right in due course, and which should not interrupt the ordinary course of a prosecution.

In the High Court also it appears to have been considered that this point raised little more than a mere technical objection and that, as the more material part of the prosecution proceedings did not take place until after the sanction had been received, it was possible to ignore the fact that the proceedings had been instituted without such a sanction. In this Court too we were asked to treat the matter on much the same lines, being invited to hold that whilst, no doubt, all that had been done in the matter prior to the 24th May was without jurisdiction, it could also be severed from the

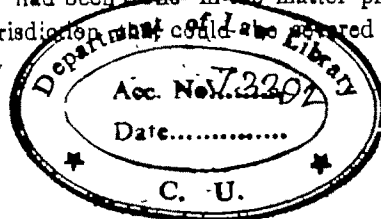
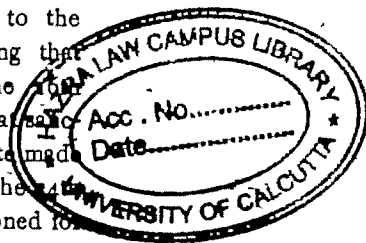
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subsequent proceedings and the latter be regarded as separate and fresh proceedings properly sanctioned. In this connection we were also referred to sections 196 and 197 of the Code of Criminal Procedure and cases decided in connection with such sections. But having regard to the difference in the wording of the sections in question as compared with the wording of clause 16 of the Drugs Control Order, 1943, we were unable to get any material assistance from such cases.

In our view the absence of sanction prior to the institution of the prosecution cannot be regarded as a mere technical defect. The clause in question was obviously enacted for the purpose of protecting the citizen, and in order to give the Provincial Government in every case a proper opportunity of considering whether a prosecution should in the circumstances of each particular case be instituted at all. Such a clause, even when it may appear that a technical offence has been committed, enables the Provincial Government, if in a particular case it so thinks fit, to forbid any prosecution. The sanction is not intended to be and should not be an automatic formality and should not so be regarded either by police or officials. There may well be technical offences committed against the provisions of such an Order as that in question, in which the Provincial Government might have excellent reason for considering a prosecution undesirable or inexpedient. But this decision must be made before a prosecution is started. A sanction after a prosecution has been started is a very different thing. The fact that a citizen is brought into Court and charged with an offence may very seriously affect his reputation and a subsequent refusal of sanction to a prosecution cannot possibly undo the harm which may have been done by the initiation of the first stages of a prosecution. Moreover in our judgment the official by whom or on whose advice a sanction is given or refused may well take a different view if he considers the matter prior to any step being taken to that which he may take if he is asked to sanction a prosecution which has in fact already been started.

In our judgment the words of clause 16 of this Order are plain and imperative, and it is essential that the provisions should be observed with complete strictness and where prosecutions have been initiated without the requisite sanction, that they should be regarded as completely null and void, and if sanction is subsequently given, that new proceedings should be commenced *ab initio*. Only so can the protection intended for the citizen be assured. In our judgment the prosecution in this case was clearly

instituted without the previous sanction required by clause 16, and it is not possible to sever the proceedings prior to the 24th May from those occurring on and after this date. Consequently, as, when the sanction was obtained, no new start was made, the whole proceedings in this case are null and void.

The appeal must accordingly be allowed and we direct the case to be remitted to the High Court, and declare that in place of the conviction recorded against the appellant an order shall be made quashing all the proceedings for want of jurisdiction. The appellant will be released from his bail and the fine if paid will be refunded.

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*Appeal allowed.*

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*Spence, C. J.*

## PRIVY COUNCIL.

PRESENT: *Lord Russell of Killowen, Lord Knight,  
Lord Goddard, Sir Madhavan Nair  
and Sir John Beaumont.*

DOORGA PROSAD CHAMARIA

v.

SECRETARY OF STATE FOR INDIA.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE  
AT FORT WILLIAM IN BENGAL.]

*Certificate—Validity of—Bengal Public Demands Recovery Act (III B. C. of 1913), sections 3 clause (b), 4, 5, 6. schedule I, clause (3), schedule II, Rule 79—Income tax—Statute directing a document to be filed—Direction, what it involves—Presumption as to filing of certificate—Evidence Act (I of 1872), section 114 III. (E)—Public demand—Certificate, issue of—Money payable to the Collector—Requisition for certificate—Certificate holder—Addition of Income-tax officer after Secretary of State—Income tax, when due and becomes debt.*

When a statute directs a document to be filed in an office, the direction involves no formal or technical procedure. All that is required is that the document should be preserved in the office in such conditions that it can be produced when required.

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When the certificate stated in the face of it to have been filed, particulars of it were registered under rule 79 schedule II of the Bengal Public Demands Recovery Act, 1913 and it was produced by the office :

*Held*, that it sufficiently proved that the certificate officer caused the certificate to be filed in his office and it was not necessary to have recourse to the presumption arising under section 114 Illustration E of the Indian Evidence Act.

The Income-tax Officer, purporting to act under the power conferred by section 45 sub-section (2) of Income Tax Act, 1922, addressed to the Collector a certificate certifying that the sum of.....due from the debtor on account of income-tax, super-tax and penalty was in arrear, and requesting the Collector to recover the amount as if it were an arrear of land revenue :

*Held*, that the effect of this certificate was to make the claim against the debtor a public demand within the meaning of the Bengal Public Demands Recovery Act, 1913, by virtue of section 3, sub-section (6) of the Act and clause (3) of schedule I.

The Certificate Officer signed a certificate stated to be under sections 4 and 6 of the Public Demands Recovery Act, 1913 :

*Held*, that as the money was payable to the Collector and accordingly the certificate was issued under section 4 of the Public Demands Recovery Act, 1913 and not under section 6, no requisition under section 5 was required.

If the monies were payable to the Collector, the name of the certificate officer should be the Secretary of State for India :

*Held*, that the addition of words "on behalf of Income-tax Officer Howrah" after "Secretary of State for India" did not in any way alter or qualify the name of the certificate-holder which was given as the Secretary of State. The words only indicated the nature of the demand for which the certificate was held, but the inclusion of the words had no effect whatever on the validity of the certificate.

Although income-tax may be described, as due for a certain year, it is not in law so due. It is calculated and assessed by reference to the income of the assessee for a given year, but it is due when demand is made under sections 29 and 45. It then becomes a debt due to the Crown, but not for any particular period.

Privy Council Appeal No. 43 of 1943 by the Certificate Debtor, from the judgment and decree of the High Court at Calcutta, in its Civil Appellate Jurisdiction, dated the 16th January, 1941, setting aside the decree of the First Subordinate Judge, Howrah, dated 31st July, 1936.

*Sir Thomas Strangman* and *W. W. K. Page* for the Appellant.  
*J. Millard Tucker* and *W. Wallach* for the Respondent.



The judgment of their Lordships was delivered by

**Sir John Beaumont** :—This is an appeal from the judgment and decree of the High Court at Calcutta, in its Civil Appellate Jurisdiction, dated 16th January 1941, by which the decree of the First Subordinate Court of Howrah, dated 31st July 1936, was set aside. The only question which arises in the appeal is whether a certificate dated 1st April 1933, issued under the provisions of the Bengal Public Demands Recovery Act, 1913, is a valid certificate. The appellant in his case claims further that the certificate, if originally valid, became unenforceable by reason of matters which occurred after the filing of the suit; but their Lordships are of opinion that the relief claimed in this suit must be confined to matters existing at the date when the suit was instituted.

On the 27th February 1933, the appellant was assessed to income-tax and super-tax by the Income-tax Officer, Howrah, under the provisions of the Income-tax Act, 1922, for the years 1928-29, 1929-30 and 1930-31, the assessments being made under the provisions of section 23, sub-section (4). Notices of demand were issued and tax for the year 1928-29 was paid by the appellant, but the tax for the remaining two years remained due. Penalties were imposed by the Income-tax Officer under section 46, sub-section (1), Indian Income-tax Act, and certain recoveries were made. It is not necessary to consider these matters in detail since it is not the appellant's case that nothing was due from him at the date of the disputed certificate, and the exact amount due is not in issue in this appeal. On 29th March 1933, the Income-tax Officer, purporting to act under the power conferred by section 46, sub-section (2), of the Indian Income-tax Act, addressed to the Collector a certificate certifying that the sum of Rs. 3,86,529-1-0 due from the appellant on account of income-tax, super-tax and penalty was in arrear, and requesting the Collector to recover the amount as if it were an arrear of land revenue. The effect of this certificate was to make the claim against the appellant a public demand within the meaning of the Bengal Public Demands Recovery Act, 1913, by virtue of section 3, sub-section (6) of the Act and clause (3) of schedule 1. The relevant provisions of the Bengal Public Demands Recovery Act, 1913, and the Rules made thereunder are as follows :—

Section 4 provides that when the certificate officer is satisfied that any public demand payable to the Collector is due he may sign a certificate in the prescribed form stating that the demand is due and cause the certificate to be filed in his office. Section 5 provides that when any public demand payable to any person other than the

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Collector is due, such person may send to the certificate officer a written requisition in the prescribed form. Section 6 provides for the recovery of a demand in respect of which a requisition has been made under section 5. Section 7 provides that when a certificate has been filed in the office of a certificate officer under section 4 or section 6, he shall cause to be served upon the certificate-debtor, in the prescribed manner, a notice in the prescribed form and a copy of the certificate. Section 9 enables the certificate-debtor within the time limited to present a petition to the certificate officer denying liability, in whole, or in part, and section 10 provides for the hearing of such petition. Section 34 empowers the certificate-debtor at any time within six months from the service upon him of the notice required by section 7 or if he files a petition under section 9 denying liability from the date of the determination of the petition to bring a suit in the Civil Court to have the certificate cancelled or modified. Section 35 states the grounds on which a certificate may be cancelled or modified by the Civil Court. By section 38 the rules in schedule 2 are given statutory effect.

Rule 79 provided that every Certificate Officer shall cause to be kept in his office a register of certificate filed in his office under the Act and shall cause particulars of all such certificates to be entered in such register, and Rule 84 provides that the forms set forth in the appendix shall be used with such variations as circumstances may require. On 1st April 1933, the Certificate Officer of Howrah signed a certificate, stated to be under sections 4 and 6, Bengal Public Demands Recovery Act. The certificate stated on its face that it was filed in the office of the Certificate Officer of Howrah and followed the form given in the appendix to the Act. In Col. 2 the name of the certificate holder was stated to be "Income-tax Officer, Howrah" and in Col. 4 the amount of the demand was stated to be Rs. 3,86,529-1-0 and in Col. 5 the particulars given were "Income-tax and penalty". On the same day the Certificate Officer ordered the issue of notice under section 7 of the Act, and on 1st May the appellant filed objections to the certificate proceedings under section 9 of the Act. On 1st August the Certificate Officer passed orders holding the certificate to be invalid, but this order was set aside by the Collector on 7th September 1933 and the case was remanded to the Certificate Officer. The order of the Collector was finally upheld by the Commissioner on 18th December 1933. On 7th September 1933, the Certificate Officer passed the following orders:—"Amend the

certificate and put down Secretary of State for Income-tax Officer, Howrah, in Col. 2 of the certificate, and reduce the amount of the certificate by Rs. 3875 as in the petition of 27th June, 1933. Issue notice under section 7 of the Public Demands Recovery Act, upon the debtor at once".

These orders were duly carried out, but the officer making the amendments seems to have understood the direction to put down Secretary of State for Income-tax Officer as meaning that the name of the Secretary of State was to be entered on behalf and not in the place of that of the Income-tax Officer. Accordingly in Col. 2 the name of the Certificate Officer was entered as "Secretary of State on behalf of Income-tax Officer, Howrah," and in Col. 4 the amount of the debt was reduced by Rs. 3875. On 17th February 1934, this suit was filed and the relief claimed was (1) A declaration that the certificate lodged by the defendant before the Certificate Officer, Howrah, on 1st April 1933, was illegal and void and inoperative: (2) An injunction restraining the defendant from enforcing or attempting to enforce the said illegal certificate: (3) An account of all monies realised by the defendant under the said illegal certificate and refund thereof to the plaintiff: (4) Release from civil prison. It will be observed, therefore, that the relief claimed is limited to a declaration that the certificate of 1st April 1933, is illegal, void and inoperative and for consequential relief, but there is no claim for modification of the amount alleged to be due on the certificate if valid.

At the trial the Subordinate Judge at Howrah decreed the plaintiff's suit holding that the certificate of 1st April, 1933, was void since no order was shown to have been made for its filing, and the name of the certificate holder was wrongly given since the name of the Secretary of State should have appeared without qualification. On appeal the High Court of Calcutta reversed this decision and dismissed the plaintiff's suit for reasons with which their Lordships are in substantial agreement. The validity of the certificate has been challenged before the Board on four grounds. First it is said that the Certificate Officer did not cause the certificate to be filed in his office, since he offered no evidence of any order having been made directing the certificate to be filed. In their Lordships' opinion there is no substance in this objection. When a statute directs a document to be filed in an office, the direction involves no formal or technical procedure. All that is required is that the document should be preserved in the office in such conditions that it can be produced when required. In the

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present case the certificate in question is stated on the face of it to have been filed ; particulars of it were registered under Rule 79, and it has been produced by the office, and the original was before their Lordships. In those circumstances, their Lordships hold it sufficiently proved that the Certificate Officer caused the certificate to be filed in his office and it is not necessary to have recourse to the presumption, arising under section 114, Illustration "E", Evidence Act.

The second objection is that there was no requisition under section 5. Their Lordships agree with the view taken by the High Court that the money was payable to the Collector and accordingly the certificate was issued under section 2 and not under section 6 and no requisition under section 5 was required. The third objection relates to the name of the certificate holder as appearing in the certificate. It is admitted by the appellant that if the monies were payable to the Collector the name of the certificate holder should be the Secretary of State for India, but it is objected that the name should be without qualification, and that in the certificate in question the name is qualified by the words "On behalf of Income-tax Officer, Howrah." In their Lordships' opinion the addition of the words "on behalf of Income-tax Officer Howrah" does not in any way alter or qualify the name of the certificate holder which is given as the Secretary of State. The words do not more than indicate the nature of the demand for which the certificate is held, information more appropriate to be stated in Col. 5 than in Col. 2, but the inclusion of the words in their Lordships' opinion, has no effect whatever on the validity of the certificate. The last objection to the certificate is that in Col. 4 no period for which the demand is due was stated as required by the heading to that column. In their Lordships' opinion, although income-tax may be popularly described as due for a certain year, it is not in law so due. It is calculated and assessed by reference to the income of the assessee for a given year, but it is due when demand is made under section 29 and section 45. It then becomes a debt due to the Crown, but not for any particular period. In the result their Lordships agree with the conclusion arrived at by the High Court of Calcutta and they will humbly advise His Majesty that this appeal be dismissed with costs.

*W. W. Bax & Co. :* Solicitors for the Appellant.

*Solicitor, India Office :* Solicitors for the Respondent.

A. T. M.

*Appeal dismissed.*

PRESENT: *Lord Chancellor (Viscount Simon), Lord  
Porter, Lord Simonds, Lord Goddard and  
Sir Madhavan Nair.*

THE KING-EMPEROR

v.

KHWAJA NAZIR AHMAD.

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[ON APPEAL FROM THE HIGH COURT OF JUDICATURE  
AT LAHORE.]

*High Court—Power to quash police investigation before charge is preferred—  
Receipt and recording of an information report, if condition precedent to  
the setting in motion of a criminal investigation—Police, if can of its own  
motion investigate into truth of matters alleged—Object of first informa-  
tion report—Findings in civil proceeding, if binding on subsequent prose-  
cution on the same or similar allegation—Judiciary, if can interfere with  
police in matters within their province—Functions of police and judiciary  
—Criminal Procedure Code (Act V of 1898), section 561A.*

The High Court has no power under section 561A of the Code of Criminal Procedure to quash police investigation into cognisable crime before a charge is preferred before the Court and not until then. The Court in its inherent jurisdiction under section 561A has power to make such orders as may be necessary to prevent abuse of the process of the Court or otherwise secure the ends of justice. It has no power to interfere with the duties of the police.

The receipt and recording of an information report is not a condition precedent to the setting in motion of a criminal investigation. The police, if in possession through their own knowledge or by means of credible though informal intelligence which generally leads them to the belief that a cognisable offence has been committed, should of their own motion undertake an investigation into the truth of the matters alleged (see section 157 of the Code of Criminal Procedure).

The object of the first information report is to obtain early information of alleged criminal activity to record the circumstances before there is time for them to be forgotten or embellished.

The findings in a civil proceeding are not binding in a subsequent prosecution founded upon the same or similar allegations.

It is the duty of the Criminal Court when a prosecution for a crime takes place before it to form its own and not to reach its conclusion by reference to any previous decision which is not binding upon it.

It is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry.

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In India, there is a statutory right on the part of the police to investigate the circumstances of an alleged cognisable crime without requiring any authority from the judicial authorities and it would not interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court.

The functions of the judiciary and the police are complementary, not overlapping, and the combination of individual liberty with a due observance of law and order is only to be obtained by having each to exercise its own function, always of course subject to the right of the Courts to intervene in an appropriate case when moved under section 491 of the Criminal Procedure Code to give directions in the nature of *habeas corpus*.

Section 561A of the Code of Criminal Procedure gives no new powers; it only provides that those which the Court already inherently possess shall be preserved and is inserted lest it should be considered that the only powers possessed by the Court are those expressly conferred by the Criminal Procedure Code and that no inherent power had survived the passing of that Act.

Privy Council Appeal No. 55 of 1943 from a decision of the High Court at Lahore dated the 24th October, 1941.

*G. D. Roberts, W. Wallach and B. Mc Kenna* for the Crown.

*C. S. Rowcastle, K. C. and S. A. Kiffin* for the Respondent.

Their Lordships' judgment was delivered by

October, 19.

**Lord Porter:**—This appeal is brought from a judgment and order of the High Court of Judicature at Lahore dated the 24th October, 1941 (Criminal Revision Side). The question raised is stated, and their Lordships think correctly stated, in the case presented by the respondent to be whether the High Court had power, under section 561A of the Code of Criminal Procedure, to quash all proceedings taken in pursuance of two first information reports.

The complainant in each case was one S. M. Saleh; the earlier report was made on the 31st August, 1941, and the later on the 5th September of the same year.

The offence in the first is stated to be in breach of section 420 of the Indian Penal Code. The facts are set out in a loose and slovenly manner and condescend on little exact detail. The result is that it is at least doubtful whether the offence should not have been described as committed in breach of section 417 instead of section 420: the vital difference between the two being that whereas an offence against the latter section is a cognisable one, that against the former is non-cognisable and investigation of it can only

be undertaken by the police on the instructions of a Magistrate, whereas in the other case the police can act on their own motion under sections 154 and 156 of the Criminal Procedure Code.

However this may be and however the offence may be described in the report itself, their Lordships are satisfied that there can rightly be spelt out of it an offence against section 409 which is also cognisable offence and possibly also one against section 420.

Apart from this, the later report though again it condescends upon rather meagre particulars, plainly indicates an accusation of an offence against section 409 and the offence is so described.

In their Lordships' view therefore, both information reports charge the accused man with cognisable offences under which the police are entitled to enquire without a Magistrate's order.

Their Lordships think it right to set out these matters because it was strenuously argued before them on behalf of the respondent that the only accusation of which account could be taken was that contained in the first of the two reports, that the offence there charged was a non-cognisable offence and therefore the police were precluded under section 155 of the Criminal Procedure Code from enquiring into it without a Magistrate's order.

The argument, as their Lordships understood it, was that the only information report under sections 154 to 156 of the Criminal Procedure Code was that recorded on the 31st August, 1947, that the allegations recorded at a later stage of the 5th September were not an information report, but a statement taken in the course of an investigation under sections 161 and 162 of the Code, that there was therefore no reported cognisable offence into which the police were entitled to enquire, but only a non-cognisable offence which required a Magistrate's order if an investigation was to be authorised.

Their Lordships cannot accede to this argument. They would point out that the respondent in his case treats each document as a separate information report and indeed, on the argument presented on his behalf, rightly so, since each discloses a separate offence, the second not being a mere amplification of the first, but the disclosure of further criminal activities. But in any case the receipt and recording of an information report is not a condition precedent to the setting in motion of a criminal investigation. No doubt in

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the great majority of cases, criminal prosecutions are undertaken as a result of information received and recorded in this way, but their Lordships see no reason why the police, if in possession through their own knowledge or by means of credible though informal intelligence which genuinely leads them to the belief that a cognisable offence has been committed, should not of their own motion undertake an investigation into the truth of the matters alleged. Section 157 of the Criminal Procedure Code, when directing that a police officer, who has reason to suspect *from information or otherwise* that an offence which he is empowered to investigate under section 156 has been committed shall proceed to investigate the facts and circumstances, supports this view.

In truth the provisions as to an information report (commonly called a first information report) are enacted for other reasons. Its object is to obtain early information of alleged criminal activity, to record the circumstances before there is time for them to be forgotten or embellished, and it has to be remembered that the report can be put in evidence when the informant is examined if it is desired to do so.

As has already been pointed out, the respondent himself speaks of two information reports in the case presented for their Lordships' consideration. Though the High Court in their judgment discussed the question whether the only crime formally disclosed was not cognisable and if so whether the investigation based upon the information report of the 30th August should not be quashed, they gave no decision on the matter, saying only that it raised a difficult point of law which they found it unnecessary to decide. They then proceeded to determine the point at issue upon other grounds which are those raised in the cases presented to their Lordships. These it is now necessary to discuss.

It appears that S. M. Saleh was the son of Sheik Rahmatullah who died in 1924 and that some time after his death disputes arose between his children including S. M. Saleh as to the partition of his property. In this dispute arbitrators were originally appointed but their authority to act was afterwards withdrawn. One of the assets was a business which had been carried on by the father and after his death was continued by the wife and children as a single partnership concern according to the respective shares in the property left by the deceased man, and in 1937 a suit was begun by Saleh against his brothers and sister for partition of the family property and for dissolution of the partnership and rendition of accounts. The respondent is the Special Official Receiver of the



High Court, Lahore, and was in that capacity appointed on the 17th August, 1937, as receiver in the suit.

The criminal charge which the police were investigating concerns his activities in the receivership and his alleged behaviour in seeking the appointment. According to Saleh, he was persuaded by the respondent by means of various fraudulent representations to undertake the suit and to ask that the respondent should be appointed receiver of the property. If this story is true, there is no doubt but that Saleh was a party to an appointment made for the purpose of over-reaching his brothers and sister. At a later stage, however, Saleh became dissatisfied with the activities of the respondent as receiver and on the 27th June, 1939, applied to have him removed from the receivership and supported his application by an affidavit sworn on the 9th of June. The grounds of the application were substantially the same as those put forward in the two information reports as criminal acts calling for a prosecution.

The Subordinate Judge refused to accede to the application, but the receiver voluntarily resigned and Saleh and one of his brothers S. A. Mannan were appointed in his place. In order to clarify the position however, the Subordinate Judge, a short time afterwards, viz., on the 30th August, 1939, directed the respondent to continue in possession of certain property, the subject-matter of the suit, notwithstanding that he had ceased to be receiver. From these two orders Saleh appealed to the High Court which on the 4th April, 1940, dismissed the appeal with costs, observing: "It appears that the charges are baseless and that no loss attributable to the conduct of Khwaja Nazir Ahmad can be shown. The charges, it is clear from the record, have been made recklessly and without any attempt to examine the history of the case, a proper consideration of which would have prevented any reasonable person from using such terms as fraud and dishonesty. It is most improper that such charges should be made without any justification."

The next step appears to have been taken by one K. L. Gauba, a barrister who had represented Saleh in certain of the proceedings. This gentleman on the 7th August, 1941, made a written complaint to a District Magistrate, charging the respondent with a number of crimes and amongst others referred to the charge made by the Saleh and enclosed his client's affidavit of the 9th June, 1939, in support of his application for the dismissal of the respondent from his receivership.

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The District Magistrate made an order for investigation into the charges and under this order the respondent's records were seized by the police on the 27th August. Thereupon the respondent petitioned the High Court on the 28th August, 1941, for their release and for stay of the investigation on the ground that he was a public servant within the definition of the Indian Penal Code, and therefore under section 197 of the Criminal Procedure Code exempt from interference by any Court without the previous sanction of the Government.

A day later the Crown presented a petition to the Court of Sessions Judge, Lahore, for revision of the Magistrate's order, asking that the record might be forwarded to the High Court under section 438 of the Code with a recommendation that the proceedings might be quashed as being void *ab initio* having been held without jurisdiction, and that pending the final decision of the petition by the High Court, further proceedings might be stayed and the Senior Superintendent of Police, Lahore, ordered not to take any further action by way of investigation.

It appears that some application was also made by the respondent to the then Chief Justice who on the 28th August sent a telegram to the District Magistrate ordering him to stop all proceedings until further orders from the Chief Justice and to return all records immediately which had been taken by the police.

The District Magistrate acted in accordance with the instructions contained in the telegram and issued the necessary orders to the police who complied with them. Thereupon Mr. Gauba filed a revision petition against the order of the District Magistrate staying further proceedings.

Both matters came before the learned Sessions Judge who felt that he was bound by the order of the then Chief Justice and on the 3rd September stayed further proceedings, and forwarded the revisions to the High Court to be disposed of at the same time as the connected revision already pending there.

Meanwhile Saleh had lodged the two information reports already referred to and as a result the police again demanded the papers which they had originally seized under Mr. Gauba's complaint and began an investigation into the crimes alleged.

The immediate consequence was a further petition by the respondent, submitting that the registration of the information report of the 31st August and the proceedings taken on it were illegal and unwarranted by law and requesting the High Court to order the Magistrate to direct that the books should be returned

by the police and that the investigation might be stayed and depended upon the result of the petition filed by Mr. Gauba.

An interim stay was granted during the vacation and the hearing before the High Court took place on the 24th October, 1941.

Two matters were then considered, firstly the Court's right to take cognizance of Mr. Gauba's petition which was opposed by both the respondent and the Crown and in respect of which there were cross petitions asking that the proceedings be quashed, and secondly what, if any, order should be issued by way of interfering with the investigation begun by the police on Saleh's information reports.

As to the first, the High Court held that the matters complained of by Mr. Gauba concerned the action of the respondent in his official capacity as receiver and therefore that he being a public servant not removable from his office without the sanction of the Local Government, and having been accused of an offence as such public servant, section 197 of the Criminal Procedure Code precluded any Court from taking cognizance of the offence without the previous sanction of the Government having power to order his removal. They accordingly dismissed the complaint and quashed the order of the District Magistrate.

In that case Mr. Gauba had petitioned the Court. The prohibition contained in section 197 is against action by any Court and in these circumstances the decision of the High Court was accepted and its order is not the subject of any appeal. The action of the police in investigating Saleh's charges is a different matter. The position in and time at which a Court is required to take cognizance of the matter has not yet been reached and the only question arising upon this part of the case or discussed before their Lordships is whether the Court which in its inherent jurisdiction under section 561A of the Criminal Procedure Code has power to make such orders as may be necessary to prevent abuse of the process of the Court or otherwise secure the ends of justice, is, in the present case justified, in using their powers to quash the police investigation.

The High Court decided that it was entitled to quash the proceedings and prohibit the investigation. Their grounds appear to have been that similar charges were levelled against the respondent four years earlier. Some of these charges they said were then actively disapproved and the rest held to be unfounded in an enquiry held as a consequence of the application to remove the respondent from his post of receiver of the property. In those

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and in these proceedings, as the High Court points out, Saleh accused himself of having been a party to a corrupt conspiracy to defeat the ends of justice. The Judges appear to have made a careful examination of the previous record, to have come to the conclusion that Saleh's evidence was unacceptable, and to have searched the records of the police investigation until it was stopped in order to see if any information beyond that contained in the earlier proceedings was forthcoming. In the result they found none.

All this may be good ground for a rejection of Saleh's accusation and a dismissal of any prosecution launched upon his information if such a prosecution ultimately takes place and if the Court are then satisfied that no crime has been established. But that stage has not been reached. It is conceded that the findings in a civil proceeding are not binding in a subsequent prosecution founded upon the same or similar allegations. Moreover, the police investigation was stopped, and it cannot be said with certainty that no more information could be obtained. But even if it were not, it is the duty of a Criminal Court when a prosecution for a crime takes place before it to form its own and not to reach its conclusion by reference to any previous decision which is not binding upon it.

In their Lordships' opinion however, the more serious aspect of the case is to be found in the resultant interference by the Court with the duties of the police. Just as it is essential that every one accused of a crime should have free access to a Court of justice, so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry.

In India as has been shown, there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without enquiring any authority from the judicial authorities, and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary, not overlapping, and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always of course subject to the right of the Court to intervene in an

appropriate case when moved under section 491 of the Criminal Procedure Code to give directions in the nature of *habeas corpus*. In such a case as the present, however, the Court's functions begin when a charge is preferred before it and not until then. It has sometimes been thought that section 561A has given increased powers to the Court which it did not possess before that section was enacted. But this is not so. The section gives no new powers, it only provides that those which the Court already inherently possess shall be preserved and is inserted, as their Lordships think, lest it should be considered that the only powers possessed by the Court are those expressly conferred by the Criminal Procedure Code and that no inherent power had survived the passing of that Act.

No doubt if no cognizable offence is disclosed, and still more if no offence of any kind is disclosed, the police would have no authority to undertake an investigation and for this reason Newsam, J., may well have decided rightly in *M. M. S. T. Chidambaram v. Shanmugam* (1). But that is not this case.

In the present case the police have under sections 154 and 156 of the Criminal Procedure Code a statutory right to investigate a cognizable offence without requiring the sanction of the Court, and to that extent the case resembles *Chhatrapat Singh Dugar v. Kharag Singh Lachmiram* (2) in which as the High Court has pointed out their Lordships' Board expressed the view that to dismiss an application on the ground that it would be an abuse of the powers of the Court might be to act on treacherous grounds.

Of course, in the present case, as in the petition brought by Mr. Gauba, no prosecution is possible unless the necessary sanction under section 197 of the Criminal Procedure Code has first been obtained. But that stage like the stage at which the Court may legitimately intervene has not in their Lordships' opinion yet been reached. The question so far is one of investigation not prosecution. In accordance with their view, their Lordships will humbly advise His Majesty that the appeal should be allowed, the decree and order of the High Court quashed and the investigation permitted to proceed.

*Solicitor, India Office:* Solicitor for the Crown.

*Seachley, Mumford & Craig:* Solicitors for the Respondent.

A. T. M.

*Appeal allowed.*

(1) (1938) A. I. R. Mad. 199.

(2) (1916) I. L. R. 44 Calc. 535.

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PRESENT: *Lord Russell of Killowen, Lord Macmillan,  
Lord Simonds, Sir Madhavan Nair and  
Sir John Beaumont.*

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December, 18.

MARUDANAYAGAM PILLAI

v.

MANICKAVASAKAM CHETTIAR.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE  
AT MADRAS.]

*Execution sale—Setting aside of—Civil Procedure Code (Act V of 1908),  
Order 21, Rules 66, 68, 90—Waiver of fresh proclamation of sale by the  
judgment-debtor, efficacy of—Conduct of decree-holder, when amounts to  
fraud on the Court—Decree-holder purchaser—Duty of Court under  
Order 21 Rule 66—Conduct of judgment-debtor, dilatory and unsatisfactory.*

The efficacy of a plea of waiver of fresh proclamation for sale by the judgment-debtor depends on the ability of the decree-holder to prove that the judgment-debtor knew the true facts from which an intention on his part to waive his right to object to a misstatement in the proclamation can be inferred.

If the decree-holder knew the true facts, if he purchased at what he knew was too low a figure based on an upset price accepted by the Court owing to his own initial misrepresentation and subsequent suppression of material facts, his conduct would amount to fraud on the Court. The Court could not have allowed the decree-holder purchasing at a Court sale to take advantage of his own fraud, whatever the conduct of the judgment-debtor might have been.

Order 21 Rule 66 of the Code of Civil Procedure imposes upon the Court the duty of causing a proclamation of the intended sale to be made and requires the proclamation to be drawn up after notice to the decree-holder and judgment-debtor and such proclamation must specify, as fairly and accurately as possible, amongst other things, any encumbrance to which the property is liable. In most cases no doubt the Court has no means of checking the information supplied by the parties, but the Court ought, as far as practicable, to check the information supplied by the parties, the Court ought to avail itself of such material. The Court is not intended to act blindly on information supplied by the parties.

The sale having taken place at a serious undervalue occasioned by failure on the part of the Court and of the decree-holder, to carry out their obligations under order 21 rule 66 of the Code of Civil Procedure and undoubtedly the judgment-debtor having sustained substantial injury thereby, the case falls within the language of order 21 rule 90 of the Code of Civil Procedure and however dilatory and unsatisfactory the conduct of the

judgment-debtor may have been, he has on the facts found debarred himself of the right to have the sale set aside.

Privy Council Appeal No 63 of 1943 by the Judgment-debtor; against the judgment and order of the High Court of Judicature at Madras, dated the 24th September, 1941, modifying those of the Subordinate Judge of Mayavaram, dated the 15th February, 1939.

*J. M. Pringle* for the Appellant.

*C. S. Remicastle* and *Air Alfred Wort* for the Respondent.

The judgment of their Lordships was delivered by

**Sir John Beaumont:**—This is an appeal from the judgment and order of the High Court of Judicature at Madras dated 24th September, 1941 which, on appeal, modified the judgment and order of the Subordinate Judge of Mayavaram dated 15th February 1939. The question in the appeal is whether a sale of immovable property, including land in the village of Tiruvall, made in execution of a mortgage decree obtained by the respondent against the appellant's predecessor is bad as regards the said land and should be so far set aside under order 21, rule 90, Civil Procedure Code, on the ground of material irregularity and fraud in publishing and conducting the sale.

The said mortgage was executed on 26th January 1925 by one Srirangathammal in respect of land in three villages, including that of Tiruvall, to secure the repayment within one year of Rs. 36000 with interest at the rate of 15 per cent. per annum. The mortgagor was the widow of the last male proprietor of the estate, holding therein the limited interest of a Hindu widow, and the appellant was the next presumptive reversioner. So far as regards the land in the village of Tiruvall and certain other lands, the mortgage was expressed to be made subject to a prior mortgage (hereinafter referred to as the "prior mortgage") dated 16th November 1924 by the same mortgagor in favour of third parties, to secure repayment of Rs. 44,500 and interest. The prior mortgage included lands not covered by the respondent's mortgage. In 1929, the mortgagees instituted a suit on the prior mortgage before the Subordinate Judge of Mayavaram joining the respondent as puisne mortgagee, and on 12th August 1929 obtained a decree for Rs. 79,238-2-6 with a direction for sale if the moneys were not paid by 12th February 1930. The realisations under this decree will be mentioned later.

In 1930, the respondent instituted a suit before the same

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Subordinate Judge on his mortgage, and on 7th October 1930 obtained a preliminary decree for Rs. 66,779-11-9, and on 27th July 1931 a final decree. In 1931, in a suit instituted by the appellant as next reversioner against the said Srirangathammal for an injunction to restrain her from committing waste, a receiver was appointed for the estate, and on 7th April 1931 he was added as a defendant in the suit on the prior mortgage, and on 27th July he was added as a defendant in the suit on the respondent's mortgage. On 15th December 1931, the respondent applied, under rule 66(2) of order 21 for execution of his decree and he annexed to his application a draft proclamation which directed that the sale should be subject to the mortgage decree obtained on the prior mortgage, and contained this statement :

" A low valuation is made as there is a prior charge of about Rs. 80,000, according to the said decree in respect of the aforesaid properties. "

The value put upon the properties by the respondent amounted to Rs. 7317. In May 1932 Srirangathammal died, and the appellant was added as a defendant in the respondent's suit, the receiver having been previously discharged. On 13th September 1932 the appellant, by his pleader, adopted the answer which had been put in by the receiver in the respondent's suit and which had challenged the respondent's draft proclamation, and the appellant agreed to put in a draft sale proclamation in the way in which he would have it, and the matter was then adjourned until 6th October 1932. On 6th October the appellant's pleader asked for an adjournment, and on its refusal stated that he had no instructions to proceed with the matter. No draft proclamation was put in by the appellant, and the Court thereupon approved the draft proclamation put in by the respondent, and adopted the respondent's valuation as the upset price. On 2nd November, the Court directed that the sale should take place on 19th December. On 25th October, the appellant had made an application alleging that the widow mortgagor had no power to bind the reversion and that accordingly the decree for sale on the respondent's mortgage could not affect the interest of the appellant, and on 16th December the appellant applied for an adjournment of the sale until this point had been determined. The Subordinate Judge thereupon adjourned the sale to 23rd January 1933 the defendant waiving a fresh proclamation. In the absence of such waiver the appellant would have been entitled to insist upon a fresh proclamation under rule 69 of order 21. Further adjournments were obtained at the instance of



the appellant, who on each occasion waived a fresh proclamation, and the sale ultimately took place on 28th March, 1933. At the sale the respondent, the decree-holder, who had obtained, leave to bid under rule 72 of order 21, was the only bidder, and he purchased at Rs. 16 above the upset price. From the judgment of the learned Subordinate Judge, it appears that after the sale the prior mortgagees sold certain land subject to the respondent's mortgage for some Rs. 10,000 and that the respondent paid to him a further sum of Rs. 1000 balance due on the prior mortgage. In the result the respondent acquired free from incumbrances and at a price rather less than Rs. 20,000 property which he had valued at Rs. 7317 subject to a mortgage for Rs. 80,000.

The position under the prior mortgage appears from Ex. M. M. which is the suit register in the Subordinate Court of Mayavaram of the prior mortgage suit. It appears that in January 1931 the receiver paid into Court Rs. 3000, and in September a further Rs. 20,000 and these sums had been paid out to the decree-holder prior to December 1931. In June 1932, sales were effected in the prior mortgage suit and sums amounting to Rs. 30,444 were paid into Court and these sums were paid out to the decree-holder in July and August 1932. November and December 1932, there were further sales for sums amounting approximately to Rs. 16,000, and this sum was paid out to the decree-holder by 4th March 1933. The position therefore is that the time when the draft proclamation was submitted by the respondent the sum of approximately Rs. 80,000 mentioned therein as due on the prior mortgage (which was correct as the sum originally due) had been reduced by a sum of Rs. 23,000. At the date when the proclamation was approved, namely, 6th October 1932 the sum had been reduced by a further Rs. 30,444, and at the date of the sale the sum had been reduced by a further Rs. 16,000 making a total reduction of Rs. 69,000.

On 19th June 1933 the appellant applied under Rule 90 of Order 21 to set aside the sale on the ground of material irregularity or fraud in publishing or conducting it. The learned Subordinate Judge came to the conclusion that the sum of Rs. 80,000 mentioned in the proclamation as the amount due on the prior mortgage was wrong at the respective date of presenting and settling the proclamation, and of the sale for the reasons hereinbefore stated, and that had the Court known the true facts the upset price would have been fixed at a much higher figure, and that the appellant had been seriously

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prejudiced by the mistake in the proclamation. He stated that he was not prepared to hold that the respondent had been guilty of fraud in mis-stating the amount due on the prior mortgage, though he considered the case to be one of grave suspicion. He held further that there was nothing to show that the appellant was aware of the payments into Court in the prior mortgage suit.

On appeal the High Court held that there was no material irregularity in the proclamation which had prejudiced the appellant. They took the view that the only mistake in the proclamation at the time when it was presented and approved by the Court was that the figure of Rs. 80,000 should have been Rs. 67,000. They considered that the further payments into Court beyond the Rs. 23,000 must have been made in respect of sales which were challenged and the payments out must have been on some form of undertaking that the amount would be refunded if the sales were eventually set aside. Their Lordships can find nothing on the record to justify these conjectures, and the further evidence read before their Lordships on behalf of the appellant, without objection from the respondent, consisting of affidavits made in the prior mortgage suit in relation to the payments out, makes it abundantly clear that these payments were only made after the sales had been confirmed. The whole basis of the High Court's judgment therefore fails, and the reasoning has not been relied upon by counsel for the respondent. The learned Judges did not think it necessary to consider the evidence as to the state of knowledge of the parties.

The respondent based his case on waiver by the appellant, contending that the appellant must have known about the sales of his own property in the prior mortgage suit, and about the disposal of the purchase monies; that accordingly when he waived his right to a fresh proclamation he must be taken to have accepted the statements in the existing proclamation and to have waived his right to object to them, and reliance was placed upon the decisions of this Board in *Girdhari Singh v. Hurdeo Narain Singh* (1) and in *Arunachellam v. Arunachellam* (2). The efficacy of a plea of waiver by the appellant depends on the ability of the respondent to prove that the appellant knew the true facts from which an intention on his part to waive his right to object to a misstatement in the proclamation can be inferred. Their Lordships appreciate that there are reasons for suspecting that the

(1) (1876, L. R. 3 I. A. 230 (P. C.).

(2) (1888 I. L. R. 12 Mad. 19; L. R. 15 I. A. 171; 5 Sar. 265 (P. C.).

appellant may have known more about the dealings with his property in the prior mortgage suit than he was prepared to admit, but they think that there are reasons at least equally cogent for suspecting that the respondent was in like case. The respondent was a party to the prior mortgage suit; he was presumably served with notice of the execution proceedings, and he was interested in seeing that the direction which the Court had given that property subject to the prior mortgage which was not subject to the respondent's mortgage should be sold before that subject to the respondent's mortgage was carried out. If the respondent knew the true facts, if he purchased at what he knew was too low a figure based on an upset price accepted by the Court owing to his own initial misrepresentation and subsequent suppression of material facts, his conduct would amount to fraud on the Court as the learned Subordinate Judge points out. The Court could not have allowed the respondent purchasing at a court sale to take advantage of his own fraud, whatever the conduct of the appellant might have been.

However, as already noted, the learned Subordinate Judge did not find fraud against the respondent, nor did he find knowledge on the part of the appellant requisite to found a plea of waiver, and the High Court did not disagree with these findings of fact. Their Lordships think that, whatever grounds for suspicions there may be, there is no material on the record which would justify the Board in disregarding the findings of fact by Subordinate Judge, who had seen the witnesses, including the appellant himself, in the witness box. Their Lordships therefore will dispose of the appeal on the basis that neither the appellant nor the respondent at the material dates knew the position under the prior mortgage.

Order 21, rule 66 imposes upon the Court the duty of causing a proclamation of the intended sale to be made and requires the proclamation to be drawn up after notice to the decree-holder and the judgment-debtor and such proclamation must specify, as fairly and accurately as possible, amongst other things, any encumbrance to which the property is liable. In most cases no doubt the Court has no means of checking the information supplied by the parties but the Court ought, as far as practicable, to bring its mind to bear upon the contents of the proclamation; and where material is readily available to check the information supplied by the parties the Court ought to avail itself of such material. In the present case all the facts relating to the prior mortgage could

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have been ascertained by an inspection of the suit register on the files of the Court. When the proclamation was settled, and again when the sale took place, it might well have occurred to the officer of the Court responsible that it was unlikely that nothing had occurred in the prior mortgage suit since its inception, even if he did not re-call having himself sold properties in that suit, and that it was desirable to check the figure of Rs. 80,000. The power conferred upon the Court by rule 66 (4) for summoning a witness for the purpose of ascertaining the matters to be specified in the proclamation shows that the Court is not intended to act blindly on information supplied by the parties. Their Lordships think that the subordinate Court cannot be acquitted of a measure of carelessness in not having checked this figure of Rs. 80,000 both when the proclamation was approved and when the sale subsequently took place. Apart from the duty cast upon the Court, rule 66, sub-rule (3) provides that every application for an order for sale shall be accompanied by a statement signed and verified in the manner mentioned, and containing so far as they are known to, or can be ascertained by, the person making the verification, the matters required by sub-rule (a) to be specified in the proclamation.

It is clear that the respondent if he did not know the position in the prior mortgage suit could easily have ascertained it, seeing that he was a party to the suit, which was in the same Court. The position therefore is that this sale took place at a serious under-value occasioned by failure on the part of the Court, and of the respondent decree-holder, to carry out their obligations under rule 66, and there can be no doubt that the appellant sustained substantial injury thereby. Their Lordships are of opinion that the case falls within the language of rule 90 and that, however dilatory and unsatisfactory the conduct of the appellant may have been, he has not on the facts found debarred himself of the right to have the sale set aside. Their Lordships will humbly advise His Majesty that this appeal be allowed, the order of the High Court be set aside and the order of the Subordinate Judge be restored. The respondent must pay to the appellant his costs of the appeal to the High Court and of the appeal to His Majesty in Council.

*Lambert & White* : Solicitors for the Appellant.

*Douglas Grant & Dold* : Solicitors for the Respondent.

A. T. M.

*Appeal allowed.*

## APPELLATE CIVIL.

Before Mr. Justice B. K. Mukherjea and  
Mr. Justice T. H. Ellis.

SARAT CHANDRA GAYAN

v.

THE PORT CANNING AND LAND IMPROVEMENT  
CO. LTD., AND ANOTHER.\*

Civil.

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December, 21.

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March, 23.

*Execution of decree—Section 47 Civil Procedure Code (Act V of 1908)—Sale held and finally confirmed, and purchase by stranger, notwithstanding receipt of notice of stay under section 34 Bengal Agricultural Debtors Act (Act VII B. C.) of 1936, as amended by Act VIII B. C. of 1940)—Application by judgment debtor challenging legality of sale, if one under said section 47—Judgment-debtor, if competent to start the proceeding.*

Soon after an application for execution of a rent-decree had been filed, the Executing Court received a notice under section 34 of the Bengal Agricultural Debtors Act directing a stay of all further proceedings in execution, but the notice somehow escaped attention and so the proceedings were continued, the sale duly held and confirmed, the purchase having been made by stranger and the execution case disposed of on full satisfaction. The present proceeding was then started by the judgment-debtor by an application under section 47 of the Code of Civil Procedure to set aside the sale on the ground that it was null and void. The questions that arose were, whether such an application could be one under section 47 of the Code of Civil Procedure and whether the present proceeding lay after the sale had been confirmed by an order of the Court and the execution case disposed of on full satisfaction :

*Held*, (1) That the question was one between the judgment-debtor and the decree-holder and the fact that the purchaser though not a party to the suit is interested in the result does not operate as a bar to the application of section 47 of the Code of Civil Procedure.

*Prosmeno Coomer Sangal v. Kasi Das Sanyal* (1) followed.

(2) That the judgment-debtor was not competent to resist the purchaser after the sale was confirmed, if he was aware of the proceeding but did not raise objection to the sale.

Case law reviewed.

No decision was given in the High Court as to the validity of sale after receipt of notice by the execution Court under section 34 of the Bengal Agricultural Debtors Act.

\*Appeal from Appellate order No 145 of 1944, against the order of D. N. Basu, Esq., Additional District Judge of Zillah 24-Parganas, dated the 12th May, 1944, reversing that of A. S. M. Salek, Esq., Subordinate Judge 3rd Court Alipore, dated the 16th December, 1943.

(1) (1192) L. R. 19 I. A. 166 ; I. L. R. Calc. 683.

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ment Co., Ltd

Application under section 47 of the Code of Civil Procedure.

The material facts will appear from the judgment.

Appeal by Judgment-debtor.

*Messrs. Panchanan Ghose and Sailendra Nath Banerjee* for the Appellant.*Messrs. Sitaram Banerjee, Birendra Kumar De, Arun Kumar Dutt, Amiya Kumar Mukherjee and Nalini Mohan Das* for the Respondents.

C. A. V.

March, 28.

The judgments of the Court were as follows :—

**Mukherjee, J. :—**This appeal is on behalf of the judgment-debtor and it arises out of a proceeding commenced by him under section 47 of the Code of Civil Procedure to set aside a rent execution sale on the ground that the sale being held in spite of a notice being issued under section 34 of the Bengal Agricultural Debtors Act was illegal and void for want of jurisdiction.

The material facts are not in controversy and may be stated as follows. The Port Canning and Land Improvement Co. Ltd., who is respondent No. 1 in this appeal, obtained a decree for rent against the appellant judgment-debtor on May 25, 1937. There were certain proceedings in execution of the decree commenced in the year 1940, but they proved infructuous, and thereafter the present application for execution was filed in the Court of the Third Subordinate Judge of 24-parganas, on May 13, 1943.

It appears that some time before this execution was started, the judgment-debtor filed an application for settlement of his debts before the Alipore Debt Settlement Board, and that Board while transferring the case for disposal to the Garia Debt Settlement Board issued a notice under section 34 of the Bengal Agricultural Debtors Act directing stay of all further proceedings in execution of the rent decree. This notice was received by the Executing Court on May 15, 1943. For some reason or other, it seems, that the attention of the Court was not drawn to this notice, and the proceedings in execution continued in the usual way and the tenancy in arrears was put up to sale and purchased by a stranger purchaser who is respondent No. 2 in this appeal. On September 13, 1943, the sale was confirmed and on the very same day, the execution case was disposed of on full satisfaction. On September 18, 1943, the decree-holder withdrew the amount due under the decree and on September 27, 1943, the sale certificate was signed and sealed.

On November 3, 1943, the judgment-debtor commenced the present proceeding to set aside the sale on the ground that it was null and void—the executing Court having no jurisdiction to proceed with the execution and put up the property to sale after receiving a notice under section 34 of the Bengal Agricultural Debtors Act.

The Trial Court allowed the application of the judgment-debtor and set aside the sale. On appeal, the learned Additional District Judge of 24-Parganas reversed the decision of the Trial Court, and dismissed the application of the judgment-debtor on the ground that such application was not maintainable under section 47 of the Code of Civil Procedure. It is against this decision that the present Second Appeal has been filed.

The main question pressed for our consideration in this appeal is as to whether or not the Court of appeal below was right in holding that the application of the judgment-debtor was not one which would come within the purview of section 47 of the Code of Civil Procedure. What the judgment-debtor wants in the present case is undoubtedly to set aside an execution sale on the ground that the executing Court had no jurisdiction to proceed with the execution and put up the property to sale after receipt of a notice under section 34 of the Bengal Agricultural Debtors Act. This obviously raises a question relating to the execution of the decree, and if the question has got to be decided between the parties to the suit or their representatives, it admits of no doubt that the matter would come within section 47 of the Code of Civil Procedure.

The learned Additional District Judge has taken the view that the matter in issue is certainly one relating to execution, discharge and satisfaction of the decree, but as it arises between the judgment debtor on the one hand and a stranger auction purchaser on the other, who at best can be a representative of the judgment-debtor himself, the provisions of section 47 of the Code of Civil Procedure are not attracted to the facts of this case.

We cannot accept this view of the learned Additional District Judge as sound. The judgment-debtor in the present case disputed the right of the decree-holder to execute the decree by sale of the attached properties as soon as a notice under section 34 of the Bengal Agricultural Debtors Act was received by the executing Court. This is undoubtedly a question between the judgment-debtor on the one hand, and the decree-holder on

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the other, and the fact that the purchaser who though not a party to the suit is interested in the result does not operate as a bar to the application of section 47 (old section 244) of the Code of Civil Procedure. Vide the observations of their Lordships of the Judicial Committee of the Privy Council in *Prosunno Coomarr Sanyal v. Kali Das Sanyal* (1).

We think, however, that there is another question which requires consideration in this case, and that is whether the judgment-debtor is competent to start the present proceeding for setting aside the sale after the sale has been confirmed by an order of the Court, and the execution case disposed of on full satisfaction. We may say that there are decisions of other High Courts in India which have gone to the length of holding that when a property has been sold in execution, and the sale has been confirmed, the executing Court becomes *functus officio*, and an objection with respect to the property sold cannot be taken under section 47 of the Code of Civil Procedure after the sale is confirmed. Vide *Ram Chandra v. Sarupa* (2) and *Wati Ram Gurditta Mal v. Mst. Ganeshi* (3).

In this Court, however, the view taken is somewhat different. One of the earliest pronouncements on this point is to be found in *Durga Charan Mondal v. Kali Prasanna Sarkar* (4). In this case, in execution of a decree for rent, an occupancy holding belonging to the judgment-debtor was sold. The sale was duly confirmed, and when the auction purchaser applied for delivery of possession, one of the judgment-debtors put in a petition objecting to the sale on the ground that the property having been a non-transferable occupancy holding was not saleable in law. It was held by this Court that the confirmation of the sale was no bar to the application under section 47 (old section 244) that was made by the judgment-debtor,—the question being one which related to the execution, discharge and satisfaction of the decree; but if the judgment-debtor was actually a party to the order for sale or was aware of the proceeding and did not appeal against it, he was precluded from questioning the propriety of the order and the sale held in pursuance of the order. The result was that the case was sent back for a proper investigation on the point as to whether or not the judgment-debtors were parties to the order for sale or were aware of the proceeding in execution.

(1) (1899) L. R. 19 I. A. 166; I. L. R. 19 Cal. 693.

(2) (1939) I. L. R. Lahore 103.

(3) (1939) I. L. R. Lahore 116.

(4) (1898) I. L. R. 26 Cal. 727.



In *Sheikh Murullah v. Sheikh Burullah* (1), a non-transferable occupancy holding was sold in execution of a decree and was purchased by one Kashi Nath who transferred it to the plaintiff. The plaintiff brought a suit for recovery of possession of the property against the judgment-debtor. It was held that the defendant having had full knowledge of the execution proceedings and not having objected to the sale was not competent to resist the purchaser after confirmation of sale. In this case, the suit was brought by the purchaser for recovery of possession, and consequently no question arose as to whether it was open to the judgment-debtor to make an application under section 47 of the Code of Civil Procedure. This was followed in *Dwarkanath Pal v. Tarini Sanhar Ray* (2), where also a suit was brought by the purchaser of a non-transferable occupancy holding for recovery of possession of the property after the sale was confirmed. It was held that as the judgment-debtor though aware of the execution proceeding did not raise any objection to the sale, it was not competent to him to resist the purchaser after the sale was confirmed, and that as between himself and the purchaser the title to the property vested in the latter on such confirmation.

Exactly the same view was taken by the Allahabad High Court in *Eala Ram v. Thakur Prasad* (3), and by a Division Bench of the Madras High Court in *Vuppulury Somasundaram v. Bhimisetti Kondayya* (4).

We have no doubt as to the soundness of the view taken in these decisions, and the result is that though we cannot accept the decision of the learned Additional District Judge, we cannot, at the same time, agree with the view taken by the learned Subordinate Judge in the Trial Court and set aside the sale merely on the ground that it was held after receipt of the notice, by the executing Court, under section 34 of the Bengal Agricultural Debtors Act.

Mr. Ghose appearing for the appellant has contended before us that the judgment-debtor appellant was not aware of the execution proceeding, and as a matter of fact, no evidence was adduced on that point and no clear finding arrived at by the Trial Court; he has further contended that even if the judgment-debtor was aware of the execution proceeding or was a party to

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(1) (1905) 9 C. W. N. 972.

(2) (1907) I. L. R. 34 Calc. 199; 5 C. L. J. 294.

(3) (1918) I. L. R. 40 All. 680.

(4) (1926) A. I. R. Mad. 12.

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the order for sale, as that order was entirely without jurisdiction, the question of *res judicata* on the basis of which the cases mentioned above were decided would have no application. It has been argued by Mr. Banerjee for the respondent that there was no allegation made by the judgment-debtor that he was really unaware of the execution proceeding and all that was averred in his petition was that the attention of the Court was not drawn to the fact that there was a notice issued by the Debt Settlement Board under section 34 of the Bengal Agricultural Debtors Act. On the other question, it is argued that the mere fact of a notice being issued under section 34 of the Bengal Agricultural Debtors Act does not by itself oust the jurisdiction of the executing Court to proceed with the sale: It is open to the executing Court to ignore the notice if it is found to be issued without jurisdiction by the Debt Settlement Board, and the question whether or not it was properly issued by the Debt Settlement Board is exclusively for the Civil Court to decide.

We do not think that it would be proper to express our opinion on either of the points mentioned above. We think that both these points require investigation. We accordingly set aside the orders of the Court below and send the case back to the Trial Court in order that the case may be reheard in accordance with the directions given above and with particular reference to the two questions formulated above. The Court will allow the parties to adduce additional evidence if it so chooses, and will dispose of the case according to law. We make no order as to costs in this Court. Subsequent costs will be in the discretion of the Trial Court. It will be for the Trial Court to decide whether pending the disposal of the case the property will remain in possession of the judgmentdebtor or will be given to the auction-purchaser. The auction purchaser, if he is so advised, may also make an application for the appointment of a Receiver.

Ellis, J. :—I agree:

P. 2.

*Appeal allowed :  
Case remanded.*

*Before Mr. Justice B. K. Mukharjee and Mr. Justice  
A. S. M. Akram.*

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*Bengal Tenancy Act (VIII of 1885 as amended), section 168 A, if repugnant to section 51 of the Code of Civil Procedure (Act V of 1908) and if void under section 107 (1) of the Government of India Act, 1935—Proviso to section 17 (1) of the Patni Regulation (VIII of 1819) if in conflict with section 168A of the Bengal Tenancy Act—Section 168A, if applicable to patni tenure.*

Section 168A of the Bengal Tenancy Act is a valid piece of legislation quite within the competence of the provincial legislature under items Nos. 2 and 21 of the provincial list. Item No. 21 of List II is wide enough to cover all matters of the remedial or adjective law in relation to land, and land tenures, arising out of relationship of landlord and tenant, and includes provisions for collection and realisation of rent by the landlord from the tenant.

A case of repugnancy does not arise if no aspect of any provincial legislation encroaches upon any field other than that of the provincial legislature.

It is not enough to say that section 168A of the Bengal Tenancy Act has introduced a provision differing from that contained in section 51 of the Code of Civil Procedure. The rival existing Indian law is not section 51 of the Code of Civil Procedure, but the provision of that section as incorporated into the Bengal Tenancy Act, but as that provision, so far as it deals with the question of procedure in a suit or proceeding between the landlord and the tenant comes under items 2 and 21 of the provincial list, there is no existing Indian law on any matter enumerated in the concurrent list with which section 168A of the Bengal Tenancy Act can be said to have come into conflict.

Also provisions of section 168A of the Bengal Tenancy Act are not repugnant to section 51 of the Code of Civil Procedure, the repugnancy is avoided by the express words of section 4 of the Code and consequently it is not void under section 107 (1) of the Government of India Act, 1935.

*Mukunda Murari Chakravarti v. Pabitrajoy Ghosh* (1) followed.

\* Appeals from Original Order Nos. 366 and 367 of 1941 against the orders of R. K. Choudhury, Esq., Subordinate Judge, 2nd Court, 24 Parganas dated the 13th August, 1941, and from Original Order No. 133 of 1942, against the Order of Babu Benoy Bhusan Sen, Subordinate Judge of Birbhum, date the 19th February, 1942, and from Appellate Order No. 54 of 1942 against the Order of Babu Brojendra Saran Sanyal, Subordinate Judge of Hooghly, 2nd Court, dated the 19th January, 1942, reversing that of Maulvi Abdul Moudud, Munaf, 3rd Court, Serampore dated the 25th August, 1941.

(1) (1944) 79 C. L. J. 87.

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Section 168 A of the Bengal Tenancy Act applies to patni tenure.

Section 168A of the Bengal Tenancy Act does not in any way affect the right of institution of a suit or obtaining a decree. The only restriction it imposes is upon the mode of execution of the decree and as no particular mode of execution is prescribed in the Patni Regulation itself it cannot be said that section 168A is in conflict with the proviso to section 17 of the Patni Regulation.

*Abdul Asis v. Maharaj Uday Chand* (1) referred to.

Appeal by the Decree-holder in Appeal from Original Orders Nos. 366 and 367 of 1941 and No. 133 of 1942.

Appeal by the Judgment-debtors in Appeal from Appellate Order No. 54 of 1941.

The material facts will appear from the judgment.

*Dr. Sarat Chandra Basak, Messrs. Hiralal Chakrabarty and Purushottam Chatterjee* for the Appellants in Nos. 366 and 367 of 1941.

*Messrs. Hem Chandra Sen, Suresh Chandra Sen, Surojit Chandra Lahiri, Mahendra Nath Mitra and Prakash Chandra Bhose* for the Respondents.

*Messrs. S. M. Bose, ( Advocate-General ) and Rama Prasad Mookerjee* for the Province of Bengal.

*Mr. Ranjit Kumar Banerjee*, for the Appellant in No. 54 of 1942.

*Dr. Sarat Chandra Basak, Messrs. Hiralal Chakrabarty, Purushottam Chatterjee and Amiya Kumar Mukherjee* for the Respondents.

*Mr. Rama Prasad Mookerjee* for the Province of Bengal.

*Dr. Sarat Chandra Basak, Messrs. Hiralal Chakrabarty, Sarat Kumar Mitra and Purushottam Chatterjee* for the Appellants in No. 133 of 1942.

*Messrs. Gopendra Nath Das and Jagadish Chandra Ghosh* for the Respondents.

*Mr. Rama Prasad Mookerjee* for the Province of Bengal.

The judgment of the Court was as follows:—

*Appeals from Original Orders Nos. 366 and 367 of 1941.*

**Mukherjee, J.:**—These two analogous appeals on behalf of the landlord decree-holder and they are directed against an order of the Subordinate Judge, Second Court, 24-Parganas, dated the 13th August, 1941, by which he allowed the objections of two sets of judgment-debtors preferred under section 47 of the Code of Civil

(1) (1943) 77 C. L. J. 271; 47 C. W. N. 523.

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Procedure, and dismissed the execution case started by the appellant.

There is no controversy about the facts of the case which lie within a very short compass. The respondents held *putni* as tenants under the Maharaja of Burdwan who is the appellant in both the appeals. The rents due in respect of this *putni* were in arrears for a considerable period of time, and on the 15th May, 1936, the *putni* was put up to sale under the provisions of Regulation VIII of 1819 for recovery of the rent due for the last *kist* of 1342 B. S., and it was purchased by a stranger. For recovery of the rent due in respect of the years 1339 to 1341 B. S. and the first *kist* of 1342 B. S., the landlord instituted a suit, being Rent Suit No. 2 of 1937, in the Court of the Subordinate Judge at Hooghly, and obtained a rent decree for a sum of rupees fifty-six thousand and annas odd on the 25th February, 1938. The decree was put into execution several times between the years 1938 and 1940, and certain sums of money were realised from the judgment-debtors.

The present execution case was started on the 25th September, 1940, in the Court of the Second Subordinate Judge of 24 Parganas, the decree being transmitted to that Court by the Subordinate Judge of Hooghly, and as the tenure in arrears had already been sold, the decree-holder applied for recovery of the balance of the decretal dues by attachment and sale of certain other immovable properties belonging to the judgment-debtors. Objections were taken to this application for execution by the judgment-debtors Nos. 4 and 5 on the one hand, and the Official Receiver who figures as judgment-debtor No. 6 on the other, and these gave rise to Miscellaneous Cases Nos. 24 and 40 of 1941.

The contention of both these sets of judgment-debtors, in substance, was that under section 168A of the Bengal Tenancy Act, the landlord decree-holder was not competent to proceed against any property of the judgment-debtors other than the tenure in arrears. This contention was given effect to by the learned Subordinate Judge, who allowed both the Miscellaneous cases, and dismissed the landlord's application for execution of the decree. The landlord has now come up on appeal to this Court.

The first and the main contention raised by Dr. Basak in support of the appeals is that section 168A of the Bengal Tenancy Act, to the extent that it limits the sale in execution of a decree for rent to the property in arrears, is void under section 107(1) of the Government of India Act, 1935, inasmuch as it is repugnant

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to section 51 of the Code of Civil Procedure which is an existing Indian law relating to item No. 4 of the concurrent list.

This identical question came for consideration on different occasions before different Division Benches of this Court, and the decisions have been uniformly against the contention of the appellant. Vide *Satish Chandra Hui v. Sudhir Krishna Ghosh* (1); *Satish Chandra Bandopadhyaya v. Bishnupada Pal* (2); and *Bir Bikram Kishore Manikya Bahadur v. Tofazzal Hossain* (3).

All the points which were canvassed in the above cases were reargued before us by Dr. Basak, but in spite of his elaborate arguments, we have not been convinced that these cases have been wrongly decided, or that it is necessary to have the matter further considered by a larger Bench.

We agree with the view taken in the above cases that section 168A of the Bengal Tenancy Act is a valid piece of legislation which is quite within the competence of the provincial legislature under items Nos. 2 and 21 of the provincial list. Item No. 21 of List 2 is wide enough to cover all matters of the remedial or adjective law in relation to land, and land tenures, arising out of relationship of landlord and tenant, and includes provisions for collection and realisation of rent by the landlord from the tenant. Under item No. 2 of the provincial list, the provincial legislature is capable of regulating the powers and jurisdiction of a Civil Court with regard to any of the matters included in item No. 21. In our opinion, the Legislature by enacting section 168A of the Bengal Tenancy Act has done nothing else except to curtail or take away the powers of the Court to allow the landlord decree-holder to proceed against any property of the tenant other than the tenancy in arrears, for realisation of the decretal dues. This undoubtedly, it is competent to do. Really, a case of repugnancy does not arise if no aspect of any provincial legislation encroaches upon any field other than that of the provincial legislature. But, assuming as Dr. Basak argues, that the operation of section 107(1) of the Government of India Act, 1935, is not excluded from cases where the provisions of the provincial law are exclusively on provincial subjects, it is certainly necessary to attract the operation of the sub-section that the existing Indian law with which a provincial law is said to have come into conflict relates to one of the matters enumerated in the concurrent list.

(1) (1942) 75 C. L. J. 190; 46 C. W. N. 540.

(2) (1942) 46 C. W. N. 628.

(3) (1942) 46 C. W. N. 999.

Now, the Bengal Tenancy Act is a self contained Act, and lays down its own rules of procedure which govern suits between landlord and tenants and regulate the proceedings in execution of rent decrees. No provision of the Code of Civil Procedure of its own force applies to any suit or proceeding under the Bengal Tenancy Act, but by reason of the express provisions of section 143(a) of the Bengal Tenancy Act, the provisions of the Code of Civil Procedure subject to certain modifications have been incorporated into the Act. If the procedure laid down in the Bengal Tenancy Act is to be changed or modified, it has certainly to be done by the Bengal Legislature. In our opinion, it is not enough to say that section 168A of the Bengal Tenancy Act has introduced a provision differing from that contained in section 51 of the Code of Civil Procedure. The rival existing Indian law, in the present case, is not section 51 of the Code of Civil Procedure, but the provision of that section as incorporated into the Bengal Tenancy Act, but as that provision, so far as it deals with the question of procedure in a suit or proceeding between the landlord and the tenant comes under items Nos. 2 and 21 of the provincial list, there is no existing Indian law on any matter enumerated in the concurrent list with which section 168A of the Bengal Tenancy Act can be said to have come into conflict.

We are also definitely of opinion that the impugned section is not repugnant to section 51 of the Code of Civil Procedure, and the repugnancy is avoided by the express words of section 4 of the Code. That section lays down that in the absence of any specific provision to the contrary nothing in the Code shall be deemed to limit or otherwise affect any special or local law in force at the date of the commencement of the Code or any special jurisdiction or power conferred or any special form of procedure provided by or under any other law for the time being in force. The Bengal Tenancy Act has had all along a special form of procedure provided by it for execution of rent decrees, and section 168A of the Bengal Tenancy Act only makes an addition to the provisions already existing. Dr. Basak argues that there is no question of conferring any special power or creating any special jurisdiction in this case, as what has been done is only to take away some of the existing powers; but conferring of a special power or creation of a special jurisdiction may, and, in fact, does imply the taking away or curtailment of the existing jurisdiction to some extent. The whole object of section 168A is to limit the liability of the tenants in certain respects when a decree for rent has been obtained against

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him by the landlord. For the purpose of giving this protection, a special form of procedure has been introduced by section 168A of the Bengal Tenancy Act, and whether it superseded in part or modified the existing procedure is really immaterial. The powers which the Court has got to exercise are undoubtedly special powers which are quite different from those which are ordinarily vested in an executing Court.

The decision of the Federal Court in *Mukunda Murari Chakravarti v. Pabitra Mohan Ghosh* (1), may be cited as an authority on the point. All that section 3 of the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act provides is to take away the powers which the executing Court possesses under Order XXI, rule 24 of the Code of Civil Procedure, but this curtailing or taking away of the existing power was construed to amount to conferring of special power or special jurisdiction within the meaning of section 4 of the Code of Civil Procedure. Our conclusion, therefore, is that the provision of section 168A of the Bengal Tenancy Act is not in any way repugnant to section 51 of the Code of Civil Procedure, and consequently, it is not void under section 107(1) of the Government of India Act, 1935.

The only other ground put forward by Dr. Basak is that the decree in the present case which was for antecedent balances of the *putni* rent could not be a rent decree as laid down in the proviso to section 17 of the Putni Regulation, and consequently, to the extent that section 168A of the Bengal Tenancy Act deprives the landlord of his rights as an ordinary money decree-holder it is an encroachment upon the law as laid down in the Putni Regulation, and under section 195 Bengal Tenancy Act the law laid down in the Putni Regulation is entitled to prevail. This point was also considered in *Abdul Aziz v. Maharaj Uday Chand* (2), by a Division Bench of this Court of which I was a member. It was there pointed out that section 168A of the Bengal Tenancy Act does not, in any way, affect the right of instituting a suit or obtaining a decree. The only restriction it imposes is upon the mode of execution of the decree and as no particular mode of execution is prescribed in the Putni Regulation itself, it cannot be said that section 168A of the Bengal Tenancy Act is in conflict with the proviso to section 17 of the Putni Regulation.

(1) (1944) 79 C. L. J. 87.

(2) (1943) 77 C. L. J. 271 ; 47 C. W. N. 523.



The result is that both the contentions are overruled, and the appeals are dismissed with costs: Hearing fee two gold mohurs in each appeal.

Certificate under section 205(1) of the Government of India Act, 1935, is granted in each appeal.

*Appeal from Appellate Order No. 54 of 1942.*

This appeal, in our opinion, should be allowed. The Court of appeal below has dismissed the objection of the judgment-debtor under section 168A of the Bengal Tenancy Act on the ground that the said section is not applicable to *putni* tenures. This decision cannot be supported, in view of the several decisions of this Court. Vide *Satish Chandra Hui v. Sudhir Krishna Ghosh* (1); and *Satish Chandra Bandopadhyaya v. Bishnupada Pal* (2).

The learned Advocate for the respondent attempted to support the decision on the ground that section 168A of the Bengal Tenancy Act is inoperative by reason of its being repugnant to section 51 of the Code of Civil Procedure. This contention has been negatived in a series of decisions to which reference has already been made.

The result is that this appeal is allowed. The order of the Court of appeal below is set aside and that of the Court of First Instance is restored and affirmed. We make no order as to costs in this appeal.

Certificate under section 205(1) of the Government of India Act 1935, is granted.

*Appeal from Original Order No. 133 of 1942.*

This appeal is dismissed, the grounds taken in support of this appeal being identically the same as were raised in appeals from Original Orders Nos. 366 and 367 of 1941. We make no order as to costs in this appeal.

Certificate under section 205(1) of the Government of India Act, 1935, is granted.

**Akram, J. :—**I agree.

A. K. D. G.

*Appeals Nos. 366, 367 and 133 dismissed.  
Appeal No. 54 allowed.*

(1) (1942) 75 C. L. J. 190; 46 C. W. N. 540.

(2) (1942) 46 C. W. N. 628.

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## FEDERAL COURT.

PRESENT: *Sir Patrick Spens, Knight, Chief Justice,*  
*Mr. Justice S. Varadachariar and Mr.*  
*Justice Zafrulla Khan.*

THE SECRETARY OF STATE FOR INDIA

v.

I. M. LALL.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE  
 AT LAHORE.]

*Removal of member of Indian Civil Service—Secretary of State, if can remove—Constitution Act, 1935, section 240, sub-section (3)—Rule 55 of the Civil Services (Classification, Control and Appeal) made under section 96B of the Government of India Act, 1919—Limitation or qualification on the power of the Crown to dismiss its servant at will—Remedy—Certificate, form of—Constitution Act, 1935, section 205.*

*Per Curiam:* The Secretary of State can remove a member of the Civil Service.

The question whether there was any limitation or restriction enforceable by action on the power of the Crown through the Secretary of State so to dismiss a member of Indian Civil Service, and if so, whether such limitation or restriction was or was not complied with in fact before the order for plaintiff's removal in June, 1940, involves the true construction of section 240 of the Constitution Act, 1935:

*Held (per C. J. and Zafrulla Khan, J. Varadachariar, J. contra):* Sub-section (3) of section 240 of the Constitution Act, 1935, imposes in certain cases certain statutory obligations to be carried out before dismissal is effected breach of which will give to the person adversely affected a cause of action.

Where there is an enquiry and as a result thereof some authority definitely proposes dismissal or reduction in rank, the person concerned shall be told in full or adequately summarised form, the results of that enquiry, and the findings of the enquiring officer and be given an opportunity of showing cause with that information why he should not suffer the proposed dismissal or reduction of rank.

*Per Varadachariar, J.:* A comparison of clause (3) of section 240 of the Constitution Act, 1935 with rule 55 made under section 96B of the Government of India Act, 1919 will show that (subject to certain differences of wording) the general principle of notice and opportunity for defence as well as the exceptions to its application have been incorporated in the statute itself while the details of the procedure by which the principle is to be given effect to are allowed to remain matters for rules.

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Clause (3) of section 240 of the Constitution Act may be claimed to be a qualification of or even a part of the declaration contained in clause (1) of the same section as to the nature of the tenure.

Rule 55 made under section 96B of the Government of India Act, 1919 is not inconsistent with section 240 clause (3) of the Constitution Act, 1935.

Section 240(3) of the Constitution Act, 1935 is of general application to all officers and is not limited to members of the All-India Services. If, in any case, cause is shown before the enquiring officer, any representation which the officer charged may make will form part of the record and will be considered in due course by the authority finally dealing with the matter.

According to the elaborate procedure prescribed by the latter part of rule 55 made under section 96B of the Government of India Act, 1919, what was required was that the charges should be communicated to the person charged, with a statement of the allegations on which each charge was based and of any other circumstances which it was proposed to take into consideration in passing orders on the case. The officer charged, can put in a written statement of his defence, ask for an oral enquiry if he so desires and also ask to be heard in person. The Enquiring Officer was expected to make a record of the evidence and to state his findings and the grounds thereof. The rule did not contemplate the officer charged being given a copy of the finding of the Enquiry Officer and permitted to canvass its correctness. The steps provided for in the rule will be equally necessary under section 240(3) of the Constitution Act, 1935. There is nothing in the language of clause (3) to indicate that anything more or anything different was to be given after the enquiry had been completed in the presence of the officer charged and the Enquiring Officer had made his report.

The Provincial Government has authority to initiate an enquiry into the conduct of a member of an All-India service.

The matter of the inquiry is primarily one for the decision of the executive authority.

*Per C. J. & Fazlulla Khan, J.* In the view which they took of section 240 of the Constitution Act, 1935, they thought it unnecessary to decide to what extent, if at all, rules 50 and 55 made under section 96B of the Government of India Act remain in force after the 1st April, 1937. The question whether rule 55 was in force or whether or not it was in fact in the present case complied with is not relevant, for failure to comply with such a rule could not give the plaintiff any legal cause of action: *Venkata Rao v. Secretary of State for India in Council* (1).

It is not possible to construe sub-section (3) of section 240 of the Constitution Act, 1935, so as to exclude the jurisdiction of the Court to determine whether or not the opportunity to show cause has or has not been reasonable.

The opening words of section 240 of the Constitution Act, 1935 "Except as expressly provided by this Act" include a limitation or qualification on

(1) (1936) L. R. 64 I. A. 55; 65 C. L. J. 231.

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what follows in sub-section (1) by provisions found later on in the same section as by provisions found elsewhere in the Act.

Breach of sub-section (a) of section 240 of the Constitution Act, 1935, gives rise to a cause of action for a declaration that the dismissal is a nullity as having been given by one without authority to dismiss: *Suraj Narain Anand v. The North-West Frontier Province* (1).

The proper authority (in the case of Civil Servants, *vis.*, Secretary of State) has at all times the legal power of dismissal at will.

Sub-section (3) of section 240 requires that as and when an authority is definitely proposing to dismiss or to reduce in rank a member of the Civil Service he shall be so told and he shall be given an opportunity of putting his case against the proposed action and as that opportunity has to be a reasonable opportunity, the section requires not only notification of the action proposed but of the grounds on which the authority is proposing that the action should be taken and that the person concerned must be given reasonable time to make his representations against the proposed action and the grounds on which it is proposed to be taken.

*Per Varadachariar, J.*: The Court has no right to examine the correctness of the inferences drawn or conclusions reached by the Enquiring Officer or by the responsible authorities. Any opinion that the Court may form on these points or on the appropriateness of the punishment meted out to the officer cannot be allowed to influence the consideration of the only point open to examination by the Court, namely, the adequacy of the opportunity afforded to the plaintiff.

*Per C. J. and Zafrulla Khan, J.*: (Varadachariar, J. expressing no opinion): The proper remedy for wrongful dismissal of a member of Civil Service is damages for wrongful dismissal in breach of the statutory obligations imposed by sub-section (3) of section 240 of the Constitution Act, 1935. He is not entitled to a declaration that he has never been dismissed or that he still remains a member of the service.

The case being an exceptional one, leave to amend is given at a late stage. The Federal Court in this case being the first appellate Court, the Court would give leave to amend and attempt to assess the damages, had there been proper materials for assessing damages before the Court.

*Per Curiam*: The Judges of the High Court added a note to their judgment, that several substantial questions of law as to the interpretation of Government of India Act, 1935, were involved in the case and they accordingly certified that it was a fit case for appeal to the Federal Court:

*Held*, that the certificate complied with section 205 of the Constitution Act, 1935, the intention of the Judges being quite plain and there being no particular form of certificate required.

Federal Court Civil Appeal No. XII of 1944.

*Mr. N. P. Engineer* (with *Mr. S. M. Sikri*) instructed by *Mr. K. Y. Bhandarkar*, Agent for the Appellant.

(1) [1941] F. C. R. 37; 75 C. L. J. 35.

*Respondent in person* instructed by *Mr. Naunil Lal, Agent.*

The following judgments were delivered,

**Spens, C. J.** (Zafrulla Khan J. agreeing with him):—This is an appeal by the Secretary of State for India in a suit instituted by the respondent, Mr. L. M. Lall who was a senior member of the Indian Civil Service in the year 1940, when the Secretary of State for India purported to remove him from the service. Mr. Lall's suit was originally commenced in the Court of the Sub-Judge, First Class, Lahore. It was later transferred to the High Court for hearing and was finally heard by a Division Bench of the High Court (Abdul Rashid and Ram Lal JJ.). On the 27th March, 1944, the High Court made a decree in Mr. Lall's favour declaring that the order made in the year 1940 for the removal of Mr. Lall from the Indian Civil Service with effect from the 4th June, 1940, was wrongful, void, illegal and inoperative, and that Mr. Lall was still a member of the Indian Civil Service. At the time the learned Judges made this order they added a note to their judgment that several substantial questions of law as to the interpretation of the Government of India Act, 1935, were involved in the case, and they accordingly certified that it was a fit case for appeal to the Federal Court. Hence this appeal. It was suggested by Mr. Lall that the above certificate was not in proper form to comply with section 205 of the Constitution Act, 1935. We were wholly unable to accept any such contention. The intention of the learned Judges is quite plain. No particular form of certificate is required.

The material facts can be summarised as follows :—

Mr. Lall was appointed to the Indian Civil Service in the year 1922, and on the 1st September in that year entered into a covenant with the Secretary of State in Council. The covenant recited that the Secretary of State in Council had appointed Mr. Lall "to serve His Majesty as a member of the Civil Service of India..... such service to continue during the pleasure of His Majesty, His Heirs and Successors, to be signified under the hand of the Secretary of State for India....."

In the year 1935, Mr. Lall was stationed in Hoshiarpur. While there he enlisted one Sundar Das, a nephew of his wife, in the subordinate staff of one of the Courts under his control. Shortly thereafter Mr. Lall took over charge as District and Sessions Judge at Multan. In June 1935, two applications were received from Sundar Das for the transfer of Sundar Das to

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Multan. In August 1935, Mr. Lall appointed Sundar Das as Ahlmad to one of the Sub-Judges under him, in an officiating arrangement. In April 1936, Mr. Lall went on leave to England and whilst he was on leave Sundar Das was reverted to unemployment. On the 22nd October, 1936, Mr. Lall resumed charge as District and Sessions Judge, Multan, and on the 29th October, 1936, Mr. Lall signed a proposal for Sundar Das to be appointed Ahlmad at the Sub-Judge's Court, Leliah. On the 23rd December, 1936, Mr. Lall approved a further proposal put up by the Clerk of his Court for the confirmation of Sundar Das in place of an official who had retired. This order would have had the effect of promoting Sundar Das over the heads of a number of subordinate officials senior to him. Several of the persons affected took steps to petition against this order. Subsequently on or before the 20th March, 1937, the Clerk of Court put up to Mr. Lall a note explaining that a mistake had been made and that the vacancy in which Sundar Das had been appointed actually did not exist and suggested the cancellation of the order of the 23rd December, 1936. On the 22nd March, 1937, Mr. Lall cancelled his order of the 23rd December, 1936, but simultaneously confirmed a series of proposals including the confirmation of Sundar Das as a paid candidate. Early in April 1937, Mr. Lall was transferred to be employed in the North-West Frontier Province. Before going however he passed a number of orders affecting some of the junior officials who had protested against the order of the 23rd December, 1936. By an order of the 4th March, 1937, he directed the posting of one of them to Alipore, alleged to be a particularly unpleasant station. By one of the orders made on the 22nd March, 1937, he confirmed a proposal by the Clerk of Court to transfer two other of such persons, from headquarters at Multan to Muzaffargarh and Khanewal as a disciplinary measure. By another order he reduced one of these one place in seniority and before he left Multan he recorded adverse remarks in the service books of four of the persons who had protested.

In September, 1937, whilst Mr. Lall was serving in the North-West Frontier Province, he received a letter from the Judicial Commissioner, enclosing a letter, dated the 2nd September, 1937, from the Chief Secretary to N. W. F. P. Government, informing the Judicial Commissioner, that the Punjab Government had decided to hold a departmental enquiry under Rule 55 of the Civil Services (Classification, Control and Appeal) Rules into the conduct of Mr. Lall whilst stationed at Multan during 1935-36, and

that eight charges had been framed against Mr. Lall of which copies were enclosed. The letter proceeded to ask that steps should be taken to serve the charges on Mr. Lall and that Mr. Lall should be asked to furnish within a reasonable time a written statement of his defence and to state whether he wished to be heard in person or not. The eight charges enclosed were divided into two categories. The first category alleged improper favouritism or nepotism in connection with Mr. Lall's dealings with Sundar Das : the second alleged improper victimization of certain of the junior officials who had protested against the attempted promotion of Sundar Das by the order of December, 1936. At the end of each charge was indicated the witnesses or documents whereby it was proposed to attempt to prove the charge. Interposed between the last charge (that dealing with the adverse entries in the service books) and the indication of the evidence by which that charge was proposed to be proved, there were two paragraphs to the following effect :—

"That the above facts and his failure to offer any sufficient explanation up to the present are sufficient to prove that he had abused his position as an officer entrusted with the power of appointment on behalf of the Crown to show favour to a relation of his to the detriment of other officials serving under him, in contravention both of the recognised principles governing the conduct of Government servants as well as of the express orders of Government, and that he further abused his position as an officer entrusted with powers of discipline over other officers of the Crown to persecute various persons who sought to protect their own interests in a legitimate manner.

That he should show cause why he should not be dismissed, removed or reduced or subjected to such other disciplinary action as the competent authority may think fit to enforce for breach of Government rules and conduct unbecoming to a member of the Indian Civil Service."

After obtaining copies of the documents referred to Mr. Lall in due course, namely, on the 9th January, 1938, put in his written statement in answer to the charges. At the same time he asked for certain other documents and stated "I wish to be heard in person. My position in this matter is that there is no necessity of an oral enquiry. All my orders are in writing. The material sought to be used against me are also in writing. On these materials the Government can give their decision".

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Shortly thereafter, Mr. J. D. Anderson, Commissioner, Rawalpindi Division, was appointed to hold the departmental enquiry and on the 10th June, 1938, Mr. Anderson examined Mr. Lall on the eight charges, which examination Mr. Anderson reduced into writing on the 11th June, 1938. In that statement Mr. Lall dealt with each charge at considerable length. Having recorded Mr. Lall's statement, Mr. Anderson considered it necessary to record a statement by Lala Chaman Lal, the Clerk of Court in Mr. Lall's Sessions Court at Multan. Lala Chaman Lal was duly examined in the presence of Mr. Lall who was permitted to ask whatever questions he desired and his statement was recorded on the 30th July, 1938. Mr. Anderson did not examine any other witnesses, nor did Mr. Lall apply for leave to examine any other witnesses. On the 9th August, 1938, Mr. Anderson made his report. Mr. Anderson pointed out that Mr. Lall pleaded guilty to the first two charges dealing with the enlistment and transfer to Multan of Sundar Das and to the signing of the order of the 23rd December, 1936. The remaining charges, Mr. Anderson found, on the evidence before him, were unproven. He went on however to indicate that he had not been able to make a full enquiry and that a longer investigation including a fortnight at Multan was desirable before coming to final conclusions. He indicated the desirability of numbers of other documents being examined in order to compare what Mr. Lall had done in other cases with what he had done in the cases which were the subject-matter of the charges. He finally suggested three courses to Government: (1) that orders should be passed on those charges only to which Mr. Lall had pleaded guilty, leaving the question of his guilt on the other charges undecided; (2) to hold that as the Clerk of Court was clearly not speaking the whole truth Mr. Lall's word should be accepted and the last six charges should be taken as breaking down for lack of proof; and (3) that anything Mr. Anderson had done should be regarded as a preliminary enquiry only and that some other officer should be appointed to make a complete investigation. Mr. Anderson proceeded to express his view that the third was the proper course. He moreover indicated, in the concluding paragraphs of his report, the further documents and matters which he would wish to look into before coming to final conclusions.

The Government did not disclose Mr. Anderson's report to Mr. Lall but proceeded to adopt Mr. Anderson's third suggestion and appointed Mr. F. L. Brayne (Commissioner, Rural Recon-



truction, Punjab) to complete Mr. Anderson's preliminary enquiry. On the 14th November, 1938, Mr. Lall was informed by a letter from the Chief Secretary to Government, Punjab, that Mr. Anderson had been unable to complete the enquiry against him and that its completion had been entrusted to Mr. Brayne. On the 17th November, 1938, Mr. Brayne wrote to Mr. Lall giving him the same information and informing him that the enquiry would have to be completed or at least part of it in Multan, and asking Mr. Lall to let him know the earliest date on which he could meet Mr. Brayne there. Mr. Brayne concluded by saying that he did not expect that it would take more than at most one or two days. Mr. Lall immediately took up the position that he did not understand what was happening, that he understood Mr. Anderson had completed the enquiry, and asked the Chief Secretary that he might be supplied with a copy of the report of Mr. Anderson or at least the portion of it in which it was said that his enquiry was incomplete and that he might be given a copy of the order of the Punjab Government on the report. The Government refused to give Mr. Lall any further information on the position. Mr. Lall had meantime returned from duty in the North-West Frontier Province and had been posted as Additional District and Sessions Judge, Lyallpur, and had to undertake a tour arranged before his return. He accordingly asked by a letter addressed to Mr. Brayne on the 24th November, 1938, that he might not be called to attend the enquiry until after Christmas. Mr. Brayne replied that his engagements prevented him dealing with the enquiry during the first half of January and suggested that Mr. Lall should meet him at Multan on the morning of Saturday, the 10th December, and expressed the view that he could finish everything before the mail train left on Sunday afternoon for Lahore. He subsequently by letter and telegram asked Mr. Lall to meet him on the 9th instead of on the 10th as he desired to catch the mail train to Lahore on Saturday, the 10th.

Meantime by a letter of the 29th November, 1938, Mr. Brayne informed him that at Multan he proposed to examine various other documents and purported to indicate the classes of documents which he proposed to examine at Multan and the reasons why he was proposing to examine them. To any one who had read Mr. Anderson's report this letter of Mr. Brayne would clearly have indicated what Mr. Brayne was proposing to do and why. Mr. Lall had however been refused a sight of Mr. Ander-

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son's report. Whilst before us it was submitted on behalf of the appellant that this letter adequately apprised Mr. Lall of what was in Mr. Brayne's mind, Mr. Lall at the time took up the position, and has since maintained, that it only added to his confused state of mind. On the 9th December, 1938, Mr. Lall met Mr. Brayne at Multan. Certain of those further documents which had been collected were shown to Mr. Lall, but Mr. Lall insisted that he did not understand his position and that he considered that Mr. Anderson's enquiry had been completed, and he asked for adequate time to understand his position. In these circumstances the interview was a short one and it was arranged that Mr. Lall should put his representations in writing as regards the procedure by the 19th December and that there should be a further meeting on the 20th December at Lahore and meantime copies of the relevant parts of the new documents should be sent to him. Accordingly on the 11th December, 1938, Mr. Brayne sent to Mr. Lall a large number of copies of the relevant parts of the new papers and in addition a list of 42 character rolls in which entries had been made by Mr. Lall in 1936 or 1937. Mr. Lall was informed that he wished to see the originals on the 20th, he could do so if he gave sufficient notice.

On the 15th December, Mr. Lall acknowledged receipt of the documents and asked for certain other documents to be produced at the meeting of the 20th. On the 18th December, Mr. Lall duly enclosed to Mr. Brayne his submissions in writing in regard to Mr. Brayne's enquiry. In his submission Mr. Lall again made it abundantly clear that he did not understand what was happening; that he did not understand what the further documents were for or how or in respect of what charges, they were relevant, and that none of them were mentioned in the charge sheet. In these circumstances Mr. Lall again met Mr. Brayne at Lahore on the 20th. This interview admittedly lasted a considerable time, and according to Mr. Brayne's note, made at the time and subsequently explicitly confirmed in his evidence given later at the hearing of the case in the High Court, Mr. Brayne explained the relevancy of the new documents to Mr. Lall and the reasons for which he was looking at them. Mr. Lall persisted that unless he was given a copy of Mr. Anderson's report and the Government orders thereon, he was not being given adequate opportunity of defending himself as provided by Rule 55. He asked for certain other documents and according to Mr. Brayne he then addressed him about the case. He was further permitted to put in a further

memorandum on the case by the 26th December. On the 26th December Mr. Lall forwarded to Mr. Brayne this further memorandum. Neither the original nor a copy of this document has been produced in the course of the proceedings. On the 30th December the parties again met but this written document, having been sent to Mr. Brayne in camp, had not reached him. Mr. Lall expressed the desire to address Mr. Brayne again personally after he had read Mr. Lall's written representations and the 2nd January was fixed for this purpose. Accordingly on the 2nd January, 1939, Mr. Brayne saw Mr. Lall again, and according to Mr. Brayne, Mr. Lall completed all that he desired to say to him on the case. On the 24th January, 1939, Mr. Brayne made his report.

In his report Mr. Brayne was not content with merely accepting Mr. Lall's plea of guilty to the charges of nepotism, but went into the details and surrounding circumstances at great length and found that the nepotism was "complete and deliberate". As regards the charges of vindictiveness, Mr. Brayne again went into all the details and the surrounding circumstances and found that these charges were all fully proved.

This report was sent on the 21st June, 1939, to the Federal Public Service Commission, together with some finding and recommendations of the Punjab Government thereon, for their consideration, and by a letter, dated the 31st August, 1939, from the Secretary of the Federal Public Service Commission to the Secretary to the Government of India, Home Department, the Commission expressed their concurrence in the views of the Punjab Government that Mr. Lall was unfit to be retained in the Indian Civil Service and recommended that he be removed from service under Article 353 of the Civil Service Regulations, but that in view of his seventeen years' service he should be granted the full compassionate allowance permissible under that Article.

From this it is clear that by the 31st August, 1939, there were definite proposals or recommendations of the Punjab Government, concurred in by the Federal Public Service Commission, that Mr. Lall should be removed from the service on the grounds and for the reasons set out in Mr. Brayne's report.

In the Gazette of the 10th August, 1940, there appeared a notification, over the signature of the Chief Secretary, Punjab Government, to the effect that "His Majesty's Secretary of State

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for India has directed the removal of Mr. I. M. Lall from the Indian Civil Service with effect from the 4th June, 1940".

By letter dated the 10th August, 1940, Mr. Lall was informed by the Punjab Government of his removal and was given a copy of the letter of the 31st August, 1939, above referred to, from the Federal Public Service Commission.

Meantime after the date of Mr. Brayne's report Mr. Lall remained energetic in his attempts to secure copies of the reports of Mr. Anderson and Mr. Brayne and therewith to make personal representations to the authorities. In June 1939, in particular, he pressed for an interview with His Excellency the Governor of the Punjab and on the 16th June repeated his request for copies of the report. This interview was not granted on the ground mainly that his case had passed to higher authority. Whereupon on the 23rd June, 1939, Mr. Lall requested that if the authority to decide his case were the Secretary of State, he might be permitted to place his side of the case before the Secretary of State in person and that he might be granted facilities for that purpose. On the 26th June, 1939, he was told that if he had representations to make they could be addressed to the Governor-General in the form of a memorial under the rules relating to the submission of memorials.

In the spring of 1940, Mr. Lall proceeded to London where he appears to have tried to make representations in person at the India Office.

Whatever representations were made it is clear that at no time before his removal from the service was Mr. Lall allowed to see the reports of either Mr. Anderson or Mr. Brayne, nor was he informed that either the Punjab Government or the Federal Public Service Commission or the Government of India or the Secretary of State were definitely proposing on the basis of those reports to remove him from the service. He had received the general invitation to show cause against possible dismissal (amongst other possible punishments) included at the end of the charges originally served on him. But no opportunity to show cause against dismissal was given to him, after dismissal had passed from being a possible punishment to the punishment proposed and recommended. At no time was he given an opportunity, before dismissal, of making representations against the accuracy of facts found by Mr. Anderson or Mr. Brayne in their reports or against the adverse deductions drawn against him, particularly by Mr. Brayne.

After Mr. Lall had been notified of his removal, he proceeded to enquire as to the authority under which the Secretary of State had purported to order his removal. In a letter from the Department of the Chief Secretary to the Punjab Government, he was informed on the 19th March, 1941, that the Secretary of State had not disclosed the authority under which he was acting, but the attention of Mr. Lall was drawn to Rule 50 of the Civil Services (Classification, Control and Appeal) Rules read in conjunction with sub-section 2 of section 240 of the Government of India Act.

Mr. Lall was not satisfied with this reply and made enquiries of the Secretary of State himself. By letter dated the 6th October, 1941, Mr. Lall was informed through the Punjab Government that in removing him from the Indian Civil Service, "the Secretary of State acted on behalf of His Majesty in exercise of the rights of the Crown to dismiss its servants at pleasure".

On the 20th July, 1942. Mr. Lall filed his suit asking for a declaration that the order of removal of the plaintiff from the Indian Civil Service was not passed in due course of law and was wrongful, illegal and *ultra vires* of the defendant and that Mr. Lall was still a member of the Indian Civil Service and for other relief.

Before the case had been transferred to the High Court, the Sub-Judge had settled a preliminary issue as follows :—

"Whether the Secretary of State had authority to remove the plaintiff from the Indian Civil Service, even if the enquiries were illegal or *ultra vires*".

After the case had been transferred to the High Court, the learned Judges in addition to the preliminary issue, framed a number of further issues including the following :—

1. Did the Secretary of State have authority to remove the plaintiff from the Indian Civil Service ?
2. Was it incumbent on the defendant to hold an enquiry before making an order removing the plaintiff from service ?
3. If so what should be the nature of such enquiry ?
4. Was not the plaintiff given adequate opportunity of defending himself as contemplated in Rule 55 of the Civil Services (Classification, Control and Appeal) Rules ? If not, what is the effect ?
5. Was not the plaintiff given reasonable opportunity of showing cause as laid down in section 240 (3) of the Government of India Act, 1935 ? If not, what is the effect ?

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6. Is the Court entitled to determine the question whether the opportunity given was reasonable or not?

8. Did not Mr. Brayne conduct the enquiry *bona fide*? If not, what is the effect?

On the preliminary issue the learned Judges came to the conclusion that the plaintiff could not be removed from office until he had been given a reasonable opportunity of showing cause. This determination also governed their decision on Issue No. 2. On Issue No. 1, the decision was that the Secretary of State had authority to remove the plaintiff from the Indian Civil Service. As regards Issue No. 3, the learned Judges decided that the legal obligation would be adequately complied with provided that the person concerned knew all the charges against him, and an enquiry was held in such a manner that he had reasonable opportunity to defend himself and was not prejudiced or misled in the matter of his defence. Issues Nos. 4 and 5 were thereupon dealt with together on the basis that Rule 55 and sub-section (3) of section 240 required a like compliance with the legal obligation as above set out and that what would be a breach of one would be a breach of the other, and after an exhaustive examination of exactly what happened in Mr. Lall's case, the learned Judges came to the conclusion that on the facts of the case the enquiry had not been conducted by Mr. Brayne in accordance with what appeared to them to be the legal requirements above set out. On Issue No. 8, the learned Judges accordingly found that as Mr. Brayne had not conducted the enquiry, in their view, in accordance with such legal requirements, the conduct of the enquiry could not be regarded as *bona fide*. On Issue No. 6, the learned Judges held that it was for the Court to determine whether the opportunity given was reasonable or not. In the result they decided in favour of Mr. Lall and made a declaration that the order of the removal of the plaintiff was wrongful, void, illegal and inoperative and that he still remained a member of the Indian Civil Service.

Before us, all the issues have been fully recanvassed by the Advocate-General of India and by Mr. Lall appearing in person.

The first matter to be discussed is the question whether under the Constitution Act of 1935 the Secretary of State for India has authority to remove a member of the Indian Civil Service from the service. If of course as Mr. Lall has strenuously urged no member can under any circumstances be removed by an order of the Secretary of State, it would be unnecessary to discuss any of the other

issues in the case. Mr. Lall endeavoured to put before us a detailed historical account indicating that from at least the year 1833 onwards there was always an express statutory provision prescribing the authority and manner in which an officer of the East India Company and subsequently an officer serving His Majesty in India could and should be dismissed. He submitted that throughout, whatever authority subordinate to His Majesty was given a statutory power of dismissal, there was always also an overriding power in His Majesty himself to dismiss. He argued that when on the coming into operation of Part III of the Constitution Act of 1935, the Secretary of State in Council together with all his powers came to an end, all powers formerly exercisable by him were by virtue of section 2 of the Constitution Act, 1935, vested in His Majesty, and that as under the Constitution Act there was no express delegation of such power to the Secretary of State and no express directions by His Majesty under sub-section (1) of section 2 as to the manner in which those powers were to be exercised by anyone on behalf of His Majesty, it followed that it was only His Majesty himself who could dismiss a member of the Indian Civil Service under the present circumstances. Even if it be open to Mr. Lall, having regard to the terms of his Covenant of 1st September, 1922, to question a signification of His Majesty's pleasure by the Secretary of State, which may well be doubted, we are unable to accept Mr. Lall's arguments.

In our judgment the power of the Secretary of State to dismiss, after the coming into operation of the Constitution Act of 1935, members of the Indian Civil Service who were appointed by the Secretary of State in Council prior to the commencement of Part III of the Act, is implied in the Constitution Act itself. Section 244 (1) provides that as from the commencement of Part III of the Act appointments to the Indian Civil Service shall be made by the Secretary of State. Section 321 (b) provides that the repeal of the 1919 Act shall not affect any appointment to any office made under it and that any such appointment shall have effect as if it were an appointment to the corresponding office under the 1935 Act. Mr. Lall must accordingly as from the 1st April, 1937, be regarded as if he had been appointed to the Indian Civil Service by the Secretary of State. Sub-section (2) of section 240 provides that no person who is a member of the Civil Service of the Crown in India shall be dismissed from the service of His Majesty by any authority subordinate to that by which he was

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appointed. There would here seem to be a clear implication that the authority who has been given the statutory power of appointment has the power to dismiss. This result can also be obtained from the implication which would arise from the general common law rule, that a power to appoint carries with it, in the absence of any other provision, a power to dismiss. On these grounds in our opinion there can be no reasonable doubt that from the Constitution Act itself can be found the requisite power in the Secretary of State in the year 1940 to dismiss Mr. Lall from the Indian Civil Service.

Moreover, if contrary to our views there be any difficulty in construing the Constitution Act so as to find therein, the requisite power for the Secretary of State to dismiss a member of the Indian Civil Service, there would still in our judgment be no difficulty in holding that an exercise of the power of dismissal from one of His Majesty's services by the principal Secretary of State concerned was the proper constitutional manner in which the power of the Crown should be exercised. It is surely hardly necessary in this 20th century to require authority for the practice that the executive powers of the Crown can (unless by statute or law otherwise provided) be exercised by or through the Minister responsible to Parliament for the exercise of those powers. Reference may however be made to Halsbury, Vol. VI, at para. 760 :

"The exercise of the executive powers vested in the Sovereign is delegated in practice to the various political officers who compose the Ministry or Government, certain of whom are the heads of the principal government offices or departments of State and to government officers having no political heads, and whose staff is composed of permanent members of the Civil Service."

Mr. Lall does not contest this constitutional doctrine as regards executive actions so far as English law is concerned. But he seeks to establish a difference in regard to the exercise of the executive functions of the Crown in British India. We are unable to accept any such distinction and are of opinion that if there was nothing in the Constitution Act indicating a power in the Secretary of State to dismiss members of the Indian Civil Service, the Secretary of State would none-the-less be a Minister with the constitutional right to exercise the power of dismissal on behalf of the Crown. In our judgment when the Secretary of State in June 1940 authorised the removal of Mr. Lall he was properly purporting to



act on behalf of His Majesty in exercise of the right of the Crown to dismiss its servants.

The next and the really important and difficult question in this case is whether there was any legal limitation or restriction enforceable by action on the power of the Crown through the Secretary of State so to dismiss Mr. Lall, and if so, whether such limitation or restriction was or was not complied with in fact before the order for Mr. Lall's removal in June 1940. The answer to this question involves the determination of the true construction of section 240 of the Constitution Act, which is as follows :—

“(1) Except as expressly provided by this Act, every person who is a member of a civil service of the Crown in India, or holds any civil post under the Crown in India, holds office during His Majesty's pleasure.

(2) No such person as aforesaid shall be dismissed from the service of His Majesty by any authority subordinate to that by which he was appointed.

(3) No such person as aforesaid shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him :

Provided that this sub-section shall not apply—

(a) where a person is dismissed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge ; or

(b) where an authority empowered to dismiss a person or reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to give to that person an opportunity for showing cause.

(4) Notwithstanding that a person holding a civil post under the Crown in India holds office during His Majesty's pleasure, any contract under which a person, not being a member of a civil service of the Crown in India, is appointed under this Act to hold such a post may, if the Governor-General, or, as the case may be, the Governor, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation, if before the expiration of an agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate that post.”

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First, however, the legal position before the coming into operation of the Constitution Act requires to be considered. Section 96-B of the Government of India Act, 1919, provided (*inter alia*) (a) that subject to the provisions of that Act and all rules made thereunder, every person in the Indian Civil Service held office during His Majesty's pleasure, (b) that no such person might be dismissed by any authority subordinate to that by which he was appointed, and (c) that the Secretary of State in Council might (except so far as he might provide by rules to the contrary) re-instate any such person who had been dismissed.

Rules were made under this section. The relevant rules for this case are Rules 50 and 55 of the Civil Services (Classification, Control and Appeal) Rules :

"R. 50. No member of an All-India Service, and no person holding the King's Commission on the active list of Regular Army, the Royal Air Force, the Royal Indian Navy or on the Supernumerary List of the Indian Army or appointed by the Secretary of State in Council shall be removed or dismissed except by order of the Secretary of State in Council."

"R. 55. Without prejudice to the provisions of the Public Servants Inquiries Act, 1850, no order of dismissal, removal or reduction shall be passed on a member of a Service (other than an order based on facts which have led to his conviction in a criminal court) unless he has been informed in writing of the grounds on which it is proposed to take action, and has been afforded an adequate opportunity of defending himself. The grounds on which it is proposed to take action shall be reduced to the form of a definite charge or charges, which shall be communicated to the person charged together with a statement of the allegations on which each charge is based and of any other circumstances which it is proposed to take into consideration in passing orders on the case. He shall be required, within a reasonable time, to put in a written statement of his defence and to state whether he desires to be heard in person. If he so desires or if the authority concerned so direct an oral inquiry shall be held. At that inquiry oral evidence shall be heard as to such of the allegations as are not admitted, and the person charged shall be entitled to cross-examine the witnesses, to give evidence in person and to have such witnesses called, as he may wish, provided that the officer conducting the inquiry may, for special and sufficient reason to be recorded in writing, refuse to call a witness.

The proceedings shall contain a sufficient record of the evidence and a statement of the findings and the grounds thereof.

This rule shall not apply where the person concerned has absconded, or where it is for other reasons impracticable to communicate with him. All or any of the provisions of the rule may, in exceptional cases, for special and sufficient reasons to be recorded in writing, be waived, where there is a difficulty in observing exactly the requirements of the rule and those requirements can be waived without injustice to the person charged."

These rules were in operation immediately prior to the coming into operation of Part III of the Government of India Act, 1935, and under section 276 of that Act would continue in force notwithstanding the repeal of the 1919 Act, if and in so far as the provisions of the rules were consistent with the Constitution Act, in which case they were to be deemed to be rules made under the appropriate provisions of the 1935 Act. It has been suggested before us that these rules did not continue in force, because their provisions are in fact inconsistent with the relevant provisions of the Constitution Act, or alternatively, that they could not have continued in force as they contained provisions which the rule-making authorities under the Constitution Act of 1935 could not have prescribed. The first suggestion depends upon the true construction of section 240 of the Constitution Act and whether or not the requirements prescribed by Rule 55 are or are not consistent with the provisions of sub-section (3) of section 240. The second question would appear to depend on whether or not a power to make rules in respect of conditions of service includes a power to make rules in respect of conditions in regard to dismissal or removal from the service. In the view however which we take of section 240 it is wholly unnecessary to decide to what extent, if at all, Rules 50 and 55 remain in force after the 1st April, 1937. In our view the question whether Rule 55 was in force or whether or not it was in fact in this case complied with is not relevant, for even if it were in force and had not been complied with, it is in our judgment clear that failure to comply with such a rule could not give Mr. Lall any legal cause of action: See *Venkata Rao v. Secretary of State for India in Council* (1).

The question as to the meaning and effect of section 240 appears to us to require determination in the first instance quite irrespective of the possible continued existence of the pre-

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vious rules. For it is only a breach of the statutory provisions of section 240 which can possibly afford Mr. Lall a good cause of action.

The first and chief difficulty of construing section 240 arises from the fact that in the same section it is expressly stated that except as provided by this Act every person who is a member of a Civil Service of the Crown in India "holds office during His Majesty's pleasure" and that provision is immediately followed by sub-sections (2) and (3), apparently limiting or qualifying the right of dismissal at will of such servants by the Crown.

The general rule of law is that except as otherwise provided by statute, servants of the Crown hold their appointments at the pleasure of the Crown. Where in the case of any particular servants of the Crown, statutory limitations or qualifications on the right of dismissal are found in statutes in which the general rule is not expressly enacted but left to have operation, if at all, only by implication, it has been possible for Courts to hold that those limitations and qualifications are mandatory and effective and breach of them gives rise to a cause of action: *cf.*, *Gould v. Stuart* (1). On the other hand where such limitations or qualifications are found only in rules made under a statute, which whilst expressly enacting that servants of the Crown hold office during His Majesty's pleasure also provides that such tenure is subject to the provisions of rules made thereunder, none the less breach of the provisions of such rules may afford no cause of action at all: *cf.*, section 96-B of the Government of India Act, 1919, and the Civil Services (Classification, Control & Appeal) Rules made thereunder and the decision in *Venkata Rao v. Secretary of State for India in Council* (2). If in this case we had merely been dealing with a breach of Rule 55, the decision in *Venkata Rao's* case (2) would, as indicated earlier, have been decisive against any claim by Mr. Lall. Again it may also well be that any limitation or qualification on the power of the Crown to dismiss its servants at will, attempted to be imposed by contract or agreement between some authority purporting to contract on behalf of the Crown and that servant is not legally enforceable and will give to the servant no cause of action if in fact he be dismissed in breach of any such agreement: *Donning v. Secretary of State*

(1) [1896] A. C. 575.

(2) (1936) L. R. 64 I. A. 55; 65 C. L. J. 231.

for India in Council (1). But the material provisions in this case are not left to be dealt with in rules, or in any agreement or contract. They are embodied in the very section itself.

Prior to the Constitution Act of 1935, it is true that Parliament had enacted in section 96-B of the Government of India Act, 1919, a statutory provision combining in the first sub-clause thereof (a) the provision that persons in the civil service of the Crown in India held office during His Majesty's pleasure subject to the provisions of the Act and of rules made thereunder with (b) the provision that no person in that service might be dismissed by any authority subordinate to that by which he was appointed. This last provision is reproduced in sub-section (a) of section 240 of the 1935 Act. But prior to the coming into force of the 1935 Act, no case had been based on these provisions in question in the 1919 Act. The only other previous enactment, to which our attention was drawn, in which there was combined an express statement that officers hold their appointment during pleasure with apparent limitations or qualifications on the right of dismissal at will was section 16 of the Commonwealth of Australia Defence Act 1903-1918 which provided that "Officers shall hold their appointments during the pleasure of the Governor-General but the commission of an officer shall not be cancelled without the holder thereof being notified in writing of any complaint or charge made and of any action proposed to be taken against him nor without his being called upon to show cause in relation thereto." This was the material section in *Cross v. The Commonwealth* (2). There, on the claim of an officer for a declaration that his commission had not been validly cancelled and for arrears of pay or alternatively for damages for breach of the statutory duties imposed by section 16, Knox C. J. having decided upon the facts that any such statutory duties had been duly performed and that the plaintiff's claim was in any event ill-founded in fact, went on to express the opinion that the provisions in section 16 which were introduced by the word "but" were directory only and did not constitute conditions precedent to the exercise by the Governor-General of the right of cancellation of a commission. This decision was referred to in the judgment of Latham C. J. in *Fletcher v. Nott* (3) as an example of the complete maintenance of the old rule in the case of the Commonwealth Military Forces. He appears to

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(1) T. L. R. 37 (138).

(2) 29 C. L. R. 219.

(3) 60 C. L. R. 68.

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have accepted the dictum of Knox C. J. as right, but the remark of Latham C. J. himself was made in the course of a judgment in a case wholly distinguishable on the facts both from *Cross'* case (1) and this case.

It is not surprising therefore that the Advocate-General of India argued that the express provision of sub-section (1) of section 240 clearly over-rode any limitation or qualification imposed by sub-section (3) whilst as regards sub-section (2) he submitted that it was not really a limitation on the power to dismiss but merely a statutory direction as to the channel by which the Royal pleasure was to be executed. On that ground he accepted, as he was bound to, the decision of this Court in *Suraj Narain Anand's Case* (2). But as regards sub-section (3), the learned Advocate-General argued that its provisions were very different in effect from those of sub-section (2) and that it should be construed as directory only in accordance with the *obiter dictum* of Knox C. J. in *Cross'* case (1). He supported this argument by submitting that the opening words of sub-section (1) "Except as expressly provided by this Act" clearly did not apply to anything in section 240 itself but only to provisions, such as the tenure of office of Judges, to be found elsewhere in the Act outside section 240, and that the words "during His Majesty's pleasure" should therefore be construed as wholly unqualified in law by anything in the section itself. Alternatively, the learned Advocate-General argued that if any limitation or qualification enforceable by action were imposed by the provisions of sub-section (3) such limitation had on the facts of this case been fully complied with and that Mr. Lall had had all reasonable opportunity of showing cause. The learned Advocate-General finally submitted that it was in any event not for the Court but for some executive authority to decide whether or not Mr. Lall had had reasonable opportunity.

This last submission is the point raised by *Issue No. 6* in the action and on that point we agree with the decision of the learned Judges of the High Court and for the reasons stated by them hold that it is not possible to construe sub-section (3) so as to exclude the jurisdiction of the Court to determine whether or not the opportunity to show cause has or has not been reasonable. In particular, we would call attention to the contrast in the wording of sub-clause (b) of the same sub-section where proper words appear to us to have been used to exclude the jurisdiction of the Court

(1) 29 C. L. R. 219.

(2) [1941] F. R. C. 37; (1941) 75 C. L. J. 35.

in the determination of the reasonable practicability of giving an opportunity to show cause. There the decision is clearly a matter for the authority empowered to dismiss. In the main portion of sub-section (3) there is no similar indication that the decision is only a matter for some executive authority.

Turning to the earlier submissions of the learned Advocate-General, we do not see any reason to confine the construction of the opening words of section 240 "Except as expressly provided by this Act" to provisions of the Act outside section 240 itself. It is true that there are not also words in sub-section (1) such as "subject to the provisions of this section" as are found in sub-section (2) of section 241 and elsewhere in the Act, but the opening words used in sub-section (1) of section 240 appear to us as apt to include a limitation or qualification on what follows in sub-section (1) by provisions found later on in the same section as by provisions found elsewhere in the Act.

Next it must be remembered that an important reason in *Venkata Rao's case* (1) for the decision that the material provisions in the rules were directory only was the number and diversity of the rules and their liability to be changed from time to time. In sub-section (3) of section 240 there have been enacted provisions of very limited scope in permanent statutory form as compared with the provisions in the rules considered in *Venkata Rao's case* (1). The difficulty which presented itself of allowing a cause of action to spring from one of many provisions contained in variable rules does not exist in this case. This case is in this respect perhaps nearer the case of *Cross v. The Commonwealth* (2). But the opinion of Knox C. J. quoted above is *obiter*, and expressed in respect of a section of which we do not know the history in the same way as we know the history of sub-section (3) of section 240. We know that prior to 1935 the sort of protection for the servant of the Crown provided by sub-section (3) was merely to be found in rules, many and various and liable to change. From these rules have been picked out and enacted in the section itself certain limited specific provisions only. That course must have been adopted to strengthen the protection to be afforded to the Civil Servant. The Advocate-General agrees and submits that that factor is satisfied by this protection no longer being liable to alteration or diminution by merely changing a rule. Now the protection, he urges, is guaranteed against change,

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except by an amending Act of Parliament. That is true so far as it goes. But are we to take it that that is all that Parliament intended? That though it has now embodied in the Act itself protection of very limited effect compared to the provisions of former rules, the provision is still to be a mere empty statutory and solemn assurance and that it cannot give rise to any cause of action to the unfortunate officer dismissed or reduced in rank in flagrant breach of it. This Court has already held in *Suraj Narain Anand's* case (1) that breach of sub-section (2) does give rise to a cause of action for a declaration that the dismissal is a nullity as having been given by one without authority to dismiss. It has been argued on behalf of Mr. Lall that equally under sub-section (3) the authority *prima facie* empowered to dismiss is not in a position to dismiss until the conditions of sub-section (3) have been complied with, and that any prior dismissal must be a nullity. It is this reasoning we gather that led the learned Judges in the High Court to make the declaration which they in fact made. In our judgment the distinction which the learned Advocate-General took between sub-section (2) and sub-section (3) is a good one. Under sub-section (2) no authority lower than the authority by which a civil servant was appointed has any power to execute the Crown's right of dismissal of that servant. Any purported dismissal by any such inferior authority is a mere nullity. On that view of sub-section (2) there is no real limitation on the power of the Crown to dismiss its servants at will, provided the order of dismissal is given by the prescribed authority. An order given by any other authority is ineffective. It is difficult to apply the same reasoning to sub-section (3). In the first place if no one is to have the power of dismissal until the conditions of sub-section (3) have been complied with, it would seem that there must be a clear contradiction between the provisions of sub-section (1) and sub-section (3). There would be periods, during which the conditions of sub-section (3) were being complied with, when some servants though holding office at the pleasure of the Crown and meriting instant dismissal could not in fact be dismissed at all by any one. Until the conditions of sub-section (3) were complied with, there would be no one authorised to exercise the power of dismissal. On the other hand the preferable construction may well be that the proper authority, (in the case of civil servants such as Mr. Lall, namely, the Secretary of State) has at all times the legal power of dismissal

(1) [1941] F. C. R. 37 ; (1941) 75 C. L. J. 35.



at will. An order of dismissal by him is not an order from a person who has no legal power to dismiss. He can dismiss at any time, but it may be that if he in fact dismisses without the provision of sub-section(3) being complied with, he has acted wrongfully and the person affected may have a cause of action for wrongful dismissal. Whether this is so must depend upon the exact meaning and effect to be given to the words of sub-section(3). In support however of this view as to the nature of the cause of action arising from breach of such a provision, we would refer to the passage in *Venkata Rao's* case (1) where their Lordships of the Privy Council discuss the proper remedy.

We accordingly turn to the words of the main part of sub-section (3) of section 240 with a view to determining more exactly their meaning. In our judgment the words "against the action proposed to be taken in regard to him" require that there should be a definite proposal by some authority either to dismiss a civil servant or to reduce him in rank or alternatively to dismiss or reduce him in rank as and when final action may be determined upon. It should be noted that the sub-section does not require any inquiry, any formulation of charges, or any opportunity of defence against those charges. All that it expressly requires is that where it is proposed to dismiss or reduce in rank a civil servant he should be given reasonable opportunity of showing cause against the proposal to dismiss or reduce him. It is also significant that there is no indication as to the authority by whom the action is to be proposed. It does however seem to us that the sub-section requires that as and when an authority is definitely proposing to dismiss or to reduce in rank a member of the civil service he shall be so told and he shall be given an opportunity of putting his case against the proposed action and as that opportunity has to be a reasonable opportunity, it seems to us that the section requires not only notification of the action proposed but of the grounds on which the authority is proposing that the action should be taken and that the person concerned must then be given reasonable time to make his representations against the proposed action and the grounds on which it is proposed to be taken. It is suggested that in some cases it will be sufficient to indicate the charges, the evidence on which those charges are put forward and to make it clear that unless the person can on that information show good cause against being dismissed or reduced if all or any of the charges are proved, dismissal or reduction in rank will follow. This may indeed be sufficient in

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some cases. In our judgment each case will have to turn on its own facts, but the real point of the sub-section is in our judgment that the person who is to be dismissed or reduced must know that that punishment is proposed as the punishment for certain acts or omissions on his part and must be told the grounds on which it is proposed to take such action and must be given a reasonable opportunity of showing cause why such punishment should not be imposed. That in our judgment involves in all cases where there is an enquiry and as a result thereof some authority definitely proposes dismissal or reduction in rank, that the person concerned shall be told in full, or adequately summarised form, the results of that enquiry, and the findings of the enquiring officer and be given an opportunity of showing cause with that information why he should not suffer the proposed dismissal or reduction of rank.

If that be the true meaning of the section, it seems to us one to which statutory effect in the sense that breach of it will give rise to a cause of action can without any of the difficulties or inconveniences indicated in *Venkata Rao's* case (1) be given. It can in our judgment be regarded as a provision in the Constitution Act which while it does not alter the tenure of office during His Majesty's pleasure prescribed by sub-section(1) of section 240, or the power of dismissal at will, does impose in certain statutory obligations to be carried out before dismissal is effected, breach of which will give to the person adversely affected a cause of action. It is clear that no such opportunity as indicated above was given to Mr. Lall in this case. In spite of his repeated efforts to be informed of the results of Mr. Anderson's and Mr. Brayne's enquiries and to make representations on their reports no such opportunity was given to him. No information was given to him of the proposals of the Punjab Government or of the Federal Public Service Commission or of the Government of India that he should be dismissed. He could make no representation against such proposed action. In the circumstances of this case the early notice contained in the charge-sheet that possibly dismissal might be decided upon is not in our judgment adequate compliance with the sub-section. It follows that much of the discussion as to the respective requirements of sub-section(3) of section 240 and Rule 55 and as to whether the words "adequate opportunity of defending himself" are or are not the equivalent of the words "reasonable opportunity of showing cause against the action proposed" and as to whether Mr. Brayne duly complied with the provisions of Rule 55 becomes irrelevant.

(1) (1936) L. R. 64 I. A. 55; 65 C. L. J. 231.

In our judgment the wording of sub-section (3) requires something which was not done in this case. It is not necessary to determine whether Rule 55 also required it generally or on the facts of this case. We have only to determine in the light of the facts of this case the true meaning and effect of sub-section (3). In our judgment Mr. Lall was dismissed without having been afforded the reasonable opportunity of showing cause as required by this sub-section.

That leaves only the actual remedy to be considered. As indicated earlier, Mr. Lall is not in our judgment entitled to a declaration that he has never been dismissed or that he still remains a member of the Service. His proper remedy was in our judgment damages for wrongful dismissal in breach of the statutory obligations imposed by sub-section (3) of section 240. Mr. Lall has not asked for damages. In the High Court every one appears to have taken the view, with which we respectfully cannot agree, that his remedy, if any, would be a declaration that his dismissal was a nullity. No question of a right to damages appears to have been discussed. This no doubt followed because of the judgment of this Court and the form of the relief allowed under sub-section (2) in *Suraj Narain Anand's case* (1). We doubt not however that if the learned Judges or either of them had considered that in a claim for breach of the provisions of sub-section (3) of section 240 damages might be the proper remedy, Mr. Lall would in the circumstances of this case have been given leave to amend and claim damages notwithstanding the length of time that had expired after his wrongful dismissal. Mr. Lall and every one in our view, mistook the proper remedy for the reasons indicated. In these circumstances this may well be regarded as an exceptional case, where to secure justice, leave to amend should be given at this late stage. We are the first appellate Court in this case and we would ourselves give leave to amend and attempt to assess the damages, had there been proper materials for assessing damages before us. In the circumstances we propose to make a declaration that for the order of the High Court there shall be substituted an order declaring that Mr. Lall was wrongfully dismissed on the 4th June 1940 in breach of the statutory obligations imposed by sub-section (3) of section 240, and remit the case to the High Court to take such action in regard to any application by Mr. Lall for leave to amend to claim damages, and the assessment of such damages as to the High Court shall

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seem right in view of this judgment and our remarks herein. In our judgment in the circumstances Mr. Lall is entitled to his taxed costs of this appeal and we order accordingly.

We might add however that we have had the opportunity of reading the judgment about to be delivered by our brother Varadachariar and we would state that if, as he holds, the requirements of sub-section (3) of section 240 demand nothing beyond what is required for compliance with the provisions of Rule 55, we would agree with him in the conclusions which appear to him to be the right ones to draw upon a full examination of the facts in this case.

**Varadachariar, J.:**—I agree that the Secretary of State had authority to remove the plaintiff from the Indian Civil Service (issue 1). I shall assume that, if the plaintiff had been dismissed without giving him a reasonable opportunity of showing cause against it, he would be entitled to seek redress in a Court of law (Preliminary issue, issue 2 and the latter part of issue 5). It would follow that the Court would be entitled to determine whether the opportunity given was reasonable or not (issue 6). Two questions then remain for decision; the first relates to the nature of the opportunity required by law to be given (issue 3); this turns on the interpretation of section 240(3) of the Constitution Act; the second relates to the nature of the opportunity actually given to the plaintiff (issues 4 and 5); this turns not so much on the appreciation of the evidence—which is in the main documentary and undisputed—as on the proper inference to be drawn from the evidence. It is not necessary to deal with issues 7 and 8 separately, because the findings of the High Court on these issues do not take the plaintiff further than the finding on issues 4 and 5.

I regret I am not able to concur in the interpretation which my Lord and my learned brother place upon clause (3) of section 240 of the Constitution Act. Though that provision was first enacted in the Statute itself only in 1935, a similar safeguard was previously contained in Statutory Rules framed under section 96-B of the Government of India Act of 1919. There had been for sometime a conflict of decisions in this country as to whether a public servant dismissed from his office without an enquiry held in accordance with these rules had a remedy by civil action or not. In 1936, the Judicial Committee decided that he had none [*Venkat Row's case* (1)]. The Constitution Act of 1935 was passed before this decision. Rule 55 of the Rules in force at the

time comprised three parts, one which enunciated the general principle that no order of dismissal, removal or reduction should be passed on a member of a service, unless he had been informed in writing of the grounds on which it was proposed to take action and had been afforded an adequate opportunity of defending himself; a second which dispensed with this requirement in certain cases; and a third which prescribed in some detail the procedure by which the general principle first enunciated was to be given effect to. This rule formed part of a group headed "Conduct and Discipline" beginning with rule 47 and these rules provided for "disciplinary action" in respect of members of the six classes of services specified in rule 14. Rule 49 enunciated seven kinds of penalty or punishment and rule 55 was applicable only to three of these penalties, *viz.*, dismissal, removal or reduction. The Constitution Act of 1935 provided (by section 276) for the pre-existing rules continuing in operation (so far as they were consistent with the new Act) but it thought fit to make provision in the Statute itself in respect of some of the matters dealt with in rule 55. A comparison of clause (3) of section 240 with the rule will show that (subject to certain differences of wording to which I shall presently refer) the general principle of notice and opportunity for defence as well as the exceptions to its application have been incorporated in the Statute itself while the details of the procedure by which the principle is to be given effect to are allowed to remain matters for rules.

The new method of providing the safeguard for the services will certainly have one important consequence, namely, that it will place it beyond the power of the rule-making authority to deprive the services, by any change in the rules, of the benefit of the general principle of notice and opportunity for defence. It may also have another result—and, as stated at the outset, I assume it to be so for the purposes of this case—namely that the dismissal of an officer without giving him such opportunity may entitle him to seek redress in a Court of law. The decision to the contrary in *Venkat Rao's* case (1) rested in some measure on, the ground that it could hardly have been intended to allow the statutory declaration of tenure "at the pleasure of the Crown" to be qualified or restricted by rules which were expected to provide for a variety of matters of different degrees of importance. A provision like clause (3) made in the Statute itself may with greater force be claimed to be a qualification of or even a part of the declaration

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contained in clause (1) of the same section as to the nature of the tenure. Assuming this to be so, the further questions for determination in this case are:—(i) what is the nature of the opportunity which on the true construction of clause (3) should be given to the officer concerned—is it the same as that required by rule 55 or is it substantially different; and (ii) whether such opportunity has in fact been given to the plaintiff in this case. The first question would not arise for discussion in this appeal if I were able to accept the finding of the High Court on issue 4, to the effect that the plaintiff was not given an adequate opportunity even in accordance with rule 55. Adequacy of opportunity within the meaning of section 240(3) was made the subject of a separate issue (No. 5); but the learned Judges of the High Court have not proceeded on the footing that there was a difference between the nature of the opportunity required by rule 55 and the nature of the opportunity contemplated by section 240(3); indeed they definitely reject the plaintiff's contention that he should have had two opportunities, one at the stage of enquiry and the other at the stage of the determination of the appropriate punishment. The two issues seem to have been raised separately, only in view of the possible difference in legal result between the two cases, viz., that a violation of rule 55 may not entitle the aggrieved officer to seek redress in a Court of law but a violation of the statutory condition prescribed by clause (3) of section 240 may furnish a cause of action for a suit. So far as the question of fact is concerned the learned Judges have dealt with the two issues together. For reasons to be stated presently I find myself unable to concur in the finding of fact recorded by the High Court on issues 4 and 5.

It is in this view that it becomes material to consider whether the question of compliance with clause (3) of section 240 has to be judged by a different test from that applicable to rule 55. If as a matter of law it should be held that the plaintiff should have been given an opportunity, after Mr. Brayne had submitted his report, to show cause against that report, it was not the defendant's case and the evidence does not therefore establish that such opportunity was given. It has been contended by the plaintiff that the difference in language between rule 55 and section 240(3) involves a difference in the test applicable under the two provisions. I am of the opinion that the verbal difference has only arisen from a difference in the method of drafting and does not involve or imply a difference in substance. In rule 55 one of the exceptions was expressed parenthetically, by the words "other than an

order based on facts which have led to his conviction in a Criminal Court" and the other exception was stated separately, in the second paragraph of the rule. This was apparently considered capable of improvement; accordingly when embodying the provision in the Statute, the two exceptions were brought together and with some verbal changes (not now material) they were enacted as Provisos (a) and (b) to clause (3). The rule refers to three kinds of punishment, *viz.*, dismissal, removal or reduction; clause (3) refers only to dismissal or reduction, because by an interpretation clause (section 277) applicable to the whole of Part X of the Constitution Act, "dismissal" has been made to include "removal". The change on which particular stress has been laid in support of the plaintiff's case is the substitution in the statute of the words "reasonable opportunity of showing cause against the action proposed to be taken" for the words "unless he has been informed in writing of the grounds on which it is proposed to take action and has been afforded an adequate opportunity of defending himself". It seems to me that the Statute has adopted that language only with a view to express the principle with greater brevity, as the details were expected to be provided for by the rules. The subsequent part of rule 55, which prescribes how the information of the grounds is to be given and shows what is meant by adequate opportunity of defence fits in as much with the phraseology of clause (3) of section 240 as with the language of rule 55 and I see no reason to think that rule 55 is inconsistent with section 240 (3) and must be held to be no longer in operation.

It has been contended that the language of clause (3) of section 240 would be satisfied only if an opportunity to show cause were given *after* the authority concerned had received the Report of the Enquiring Officer and was in a position to make up its mind as to the action to be taken thereon, *viz.*, whether the punishment was to be one of dismissal or only reduction. It has been further contended that such opportunity cannot be regarded as "reasonable" unless the officer against whom proceedings are being taken is given an opportunity of perusing the Report of the Enquiring Officer or is at least informed of his findings and is then given an opportunity to argue against those findings. I am unable to read all this into the substituted words.

The plaintiff's contention was also stated in another form. It was said that section 240 (3) must have contemplated cause being shown to the authority competent to dismiss the officer and as, in

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the present case, that authority was the Secretary of State, it followed that opportunity should have been afforded to the plaintiff to show cause before the Secretary of State after Mr. Brayne had made his report and the Punjab Government had made its recommendation. Section 240 (3) is of general application to all officers and is not limited to members of the All-India services. If, in any case, cause is shown before the enquiring officer, any representation which the officer charged may make will form part of the record and will presumably be considered in due course by the authority finally dealing with the matter. Further, the time-factor is not the material point in this case; it appears from the report of the Federal Public Service Commission to which the matter was referred under section 266 (3) (c) of the Constitution Act, that a representation was made by the plaintiff to that Commission. This was after Mr. Brayne had made his report and the Punjab Government had made its recommendation. The real question is whether the plaintiff had a right to be informed of Mr. Brayne's findings and of the grounds therefor, making his representations.

It is clear that the framers of sub-section (3) of section 240 had the language of rule 55 before them. According to the elaborate procedure prescribed by the latter part of the rule, what was required was that the charges should be communicated to the person charged, with a statement of the allegations on which each charge was based and of any other circumstances which it was proposed to take into consideration in passing orders on the case. The officer charged can put in a written statement of his defence, ask for an oral enquiry if he so desires and also ask to be heard in person. The Enquiring Officer was expected to make a record of the evidence and to state his findings and the grounds thereof. It is obvious that the rule did not contemplate the officer charged being given a copy of the finding of the Enquiry Officer and permitted to canvass its correctness. It cannot be denied that the steps provided for in rule 55 will be equally necessary under section 240 (3); for the officer concerned cannot be held to have had a reasonable opportunity unless he had been informed of the charges against him and had been allowed to put forward his defence and to take part in the enquiry. Is there anything in the language of clause (3) to indicate that anything more or anything different was contemplated or to suggest that a further opportunity was to be given after the enquiry had been completed in the presence of the officer charged and the enquiring officer had made-



his report? I find none; and I venture to think that if such an additional step had been intended, such intention would have been more clearly indicated. The words "against the action to be taken" found in the clause only expressed in another form the effect of the words "on which it is proposed to take action" found in two places in the rule. I am unable to accept the suggestion that the words of the statute are appropriate only to the stage when the authorities are in a position to indicate definitely what action they intended to take, *vis.*, whether it is to be one of dismissal or one of reduction and this can be predicated only after the Enquiring Officer has made his Report. The word 'proposed' seems to me to militate against this contention. Even in the view that opportunity is to be given after the Report, the decision as to the particular action to be taken can be reached only later, that is, after hearing what the officer charged has to say against the findings of the enquiring officer. It will be equally appropriate to speak of "action proposed to be taken" even at the stage of communication of the charges, the implication being that action appropriate to the charges will be taken unless the charges are rebutted. That this is practicable is shown by the form of the charges communicated to the plaintiff in this case. Under each charge, the evidence relating to it was briefly indicated and the notice concluded, "the above facts .....are sufficient to prove that he has abused his position..... He should show cause why he should not be dismissed, removed, reduced or subjected to such other disciplinary action as the competent authority may think fit to enforce.....". The concluding words as to the nature of the punishment had to be in that alternative form because there was always the possibility that the officer charged might rebut the charges or reduce their seriousness and the ultimate decision rested with the Secretary of State (as the plaintiff belonged to an All-India service) while the notice was given by and the enquiry conducted under the orders of the Provincial Government. The notice however certainly contains an indication of the action proposed to be taken and an invitation to show cause against it.

It has been elicited from Mr. Bourne (P. W. 1) that in one case a fresh notice was served on the officer charged, after the enquiring officer had submitted his report. The practice seems to have varied from time to time. A note slip added to rule 55 (in the P. & T. Edition of the Fundamental and Supplementary Rules) records a decision of the Secretary of State (No. 677) dated 28th May 1943, to the effect that "the technical requirements of section 240 (3) of

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the Government of India Act will be complied with if, when an officer is called upon to offer the defence in respect of the charges against him he is also asked at the same time to show cause against the imposition of the penalty considered *prima facie* to be appropriate should the charges against him be held to have been proved.....it should in such cases be made clear to the officer concerned that any representation that he might make in regard to the action to be taken against him in the event of all the charges or any of them being held to be proved will be considered by the final authority concerned before any order punishing him is passed". As the statutory provision itself is very recent, this is not a case in which practice, even if uniform, can be called in aid in the interpretation of the Statute.

The plaintiff contended that the Provincial Government had no authority to initiate an enquiry into the conduct of a member of an All-India service. This contention is untenable. Even members of an All-India Service are, when they serve in a Province, subject to the authority and the rule-making power of the Governor, except in so far as rules made by the Secretary of State provide otherwise (section 247 of the Constitution Act and rule 52 of the Secretary of State's rules); and rule 50 only provides that no member of an All-India Service.....shall be removed or dismissed except by order of the Secretary of State (I omit the words "in Council" as no longer relevant).

The plaintiff also urged that the Punjab Government had no power to direct a further inquiry by Mr. Brayne when Mr. Anderson had already held an inquiry into the charges against the plaintiff and submitted his report. This contention is also untenable. The matter of the inquiry is primarily one for the decision of the executive authority. In the present case, Mr. Anderson himself felt that for want of time he could not complete the inquiry and though he expressed his views on the materials then before him, he recommended to the Government to treat his inquiry as only a preliminary inquiry and to depute some officer to make a complete investigation. This is what Mr. Brayne was directed to do.

I now proceed to deal with the findings of the High Court on the question of fact raised by Issues 4 and 5. The Advocate-General of India applied for and was granted leave to argue this question and we have heard full arguments thereon from both sides. It has to be emphasised at the outset that the Court has no right to examine the correctness of the inferences drawn or conclusions reached by the inquiring officer or by the responsible

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the plaintiff all the information which he could have obtained from Mr. Anderson's report and the Government's order to Mr. Brayne. This letter was written in reply to Ex. H. P.-19 from the plaintiff to Mr. Brayne, dated the 24th November, 1938. Plaintiff asked "I wish, however, to know on what points have you to complete the inquiry". To this Mr. Brayne replied: "At Multan I propose to study the seniority list and candidates register and the service-books of those employees and candidates mentioned in the chains of changes in which Sunder Das figures. I also propose to look at other establishment cases dealt with by you between October 1936 and March 1937, both to see how many there were and how they were reported on and dealt with in comparison with those concerned with my inquiry. For similar purposes of comparison, I shall also look at entries made by you in character rolls. There are other papers I shall try to see, such as the reversion by Mr. Bedi of Sunder Das in the summer and his reappointment by you at the end of October, the other Sunder Das' transfer to Alipore, and the inspection notes of the Courts in which the five clerks who appealed were employed as referred by you in your statement to Mr. Anderson." This letter, read in the light of the charges which had already been communicated to the plaintiff, gave him a clear idea of the nature of the inquiry which Mr. Brayne proposed to hold, of the kind of documents which he proposed to examine and the purpose for which he intended to do so. The learned Judges of the High Court themselves referred to this document as one of importance and reproduced it in full in their judgment; but they have not compared it with the concluding portion of Mr. Anderson's report and the concluding portion of the Government's order to Mr. Brayne to see that this letter contained all the information which could have been gathered from the report and the Government's order, as to the nature and purpose of the further inquiry. At the end of the report Mr. Anderson said: "To take one small point. I am asked to conclude that because Mr. Lall made four adverse comments in four character rolls, he was animated by improper motives. Before coming to any such conclusion, it would obviously be necessary to have some standard to know what sort of remarks Mr. Lall is in the habit of recording in character rolls, and to inquire on the spot into the circumstances in which he recorded remarks." It is with reference to this remark and one or two other similar remarks that the Government told Mr. Brayne: "You will gather from Mr. Anderson's report on what points further inquiry is necessary." Mr. Brayne in his letter to the plaintiff

did not refer to the other points of inquiry suggested in Mr. Anderson's report, apparently because he did not consider it necessary to go into them. For instance, Mr. Anderson suggested that it might be necessary to examine two of the Judges of the High Court; Mr. Brayne thought it unnecessary. Even before us, the plaintiff could not explain what light those Judges could have thrown on any part of the case against him. Again, Mr. Anderson suggested that evidence should be taken as to whether Alipore to which two of the offending clerks had been transferred was a Penal Station; but it was clear even from the plaintiff's answer to Charge No. 7 that the two clerks, Ishwar Das and Khem Chand, were sent to Alipore only as a 'disciplinary measure' because they were 'mischievous' men and he added: "If he were a very good man, he would not be posted at Alipore." On this statement, it was obviously unnecessary to take any further evidence as to the result or purpose of posting the clerks to Alipore. In their letter to Mr. Brayne the Punjab Government had further said: "It will be as well if you go into the chain of promotions which resulted in Mr. Lall's order of 22nd March, 1937, appointing Sunder Dass a paid candidate and see if it is an order." This direction also was communicated to the plaintiff by Mr. Brayne in H. P. 21. I am accordingly unable to agree that any prejudice was caused to the plaintiff by the order of the Government declining to furnish him with copies of Mr. Anderson's report and its direction to Mr. Brayne.

It is true that the plaintiff took strong exception to there being any further inquiry at all. As stated by him in his letter to Mr. Brayne dated the 18th December 1938 and further elaborated by him in his deposition in the suit, his position was that Mr. Anderson had completed his inquiry and practically exonerated the plaintiff of all the serious charges. Referring to Ex. D. 2 (which is the same as Ex. H. P. 21) he deposes: "My reaction to this was that what Mr. Brayne proposed doing at Multan was wholly outside the scope of an inquiry prescribed by rule 55 and I also had a doubt whether he had been ordered by the Government to hold an inquiry of this type or that the Government or the Governor had any executive authority to order such an inquiry. This letter, (Ex. D. 2) did not appear to me to be an adequate answer to my letter of the 24th December 1938." One may sympathise with the plaintiff's annoyance but he was not right in his view of the law and as to the powers of the Punjab Government. In any event, such objections are very different from the contention that he had not been

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informed of the method or scope of the proposed inquiry by Mr. Brayne.

*B. Ex. H. P. 21* itself gave the plaintiff a fair idea of the nature of the evidence that Mr. Brayne proposed to examine and of the purposes for which he intended to do so. Even if it could be said that the letter did not by itself give sufficient information to the plaintiff, the matter is placed beyond doubt by what happened on the 20th December. In his letter of the 18th December 1938 (paragraph 6) the plaintiff complained: "When I appeared before you at Multan (on the 9th December) I did not know what documents you had studied, and how you had been influenced by them. These documents are not mentioned in any of the charge-sheets with which I have been supplied. I do not know to which particular charge they appertain. I also do not know how they are relevant to the inquiry.....I do not know whether the study of seniority list, etc., is for the purposes of investigation, or there are any definite allegations which bear on the charges and which are sought to be proved by these documents. If so, I have not been informed of them and hence I am unable to rebut them". This paragraph is important in appreciating what happened when the plaintiff and Mr. Brayne met on the 20th December. The proceedings of that day are recorded in *Ex. D.-7*. The first paragraph states: "I have explained to Mr. Lall the relevancy of the new documents of which copies have been sent to him". In his evidence in the suit, Mr. Brayne explained that by these words he meant that he had explained the bearing that those documents had on the charges framed against him. He adds: "As an instance, I explained to him why I had collected the character rolls of 42 people and told him that I wanted to see whether the entries made against the four persons in this case were ordinary entries usually made by him or they were exceptional entries". Nothing has been suggested in the course of the evidence to throw any doubt on the truth of the statement of Mr. Brayne. Assuming that the plaintiff, who had called Mr. Brayne as his own witness, was in some embarrassment about cross-examining him, the plaintiff, who gave his evidence after Mr. Brayne had been examined, has not said that the story is not true. All that he says is that *Ex. D.-7* was not recorded in his presence but he admits that he received a copy of *D.-7* on the 22nd December, and he never disputed the correctness of the statement with which it opens.

For a full appreciation of the significance of what happened on the 20th December, it is also necessary to refer to what happened between the 9th December and the 18th December. On the 9th Mr. Brayne has recorded (H. P.-29): "Further documents collected were shown to Mr. Lall", and he adds a note of plaintiff's request "that he may be given adequate time to understand his position. Meanwhile he requests that he may not be asked any questions with regard to these new documents or the case in general". I am unable to accept the plaintiff's statement that on the 9th December the documents were not there and that they were not shown to him. As usual, a copy of the order of 9th December was given to him shortly thereafter; he admits in his deposition that he had a copy of the order with him when he wrote his letter of the 18th December, 1938, and he did not contest the truth of this statement. The concluding portion of Ex. H. P.-29 said "copies of the relevant parts of the new document will be sent to him immediately by post". On the 11th December 1938, Mr. Brayne wrote Ex. H. P.-65 to the plaintiff; it says: "Herewith copies of relevant parts of the new papers collected (*vide* list attached); if you wish to see original on 20th, please let me know in ample time, as some of them have been returned... ..Two papers will follow tomorrow". This letter was accompanied by copies of a large number of documents. In his letter of the 18th December (paragraph 5) the plaintiff admits having received these copies on the 15th and 16th and he refers to them as "copies of documents that you had studied at Multan". That the plaintiff must have carefully gone through these copies is shown by Ex. H. P.-31 and H. P.-31-A dated the 18th December. This sets out a letter from the plaintiff dated 15th December, 1938, and gives by way of marginal notes Mr. Brayne's answers to a number of queries made by the plaintiff with reference to some of the documents of which copies had been sent to him. H. P.-34, a letter from the plaintiff to Mr. Brayne dated the 23rd December, 1938, is also significant. It acknowledges receipt of a copy of Mr. Brayne's order, apparently Ex. D.-7 and proceeds to say: "I want to see whether representations or petitions of some of the clerks were received by Chaman Lall by post as stated by him, or were presented to him in person. I want to see the endorsement on each petition. I also consider it necessary to verify the dates. It may also be necessary to see the note of Chaman Lall dated 2nd or 3rd of March regarding copies." This letter shows that various details of the case were receiving

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the closest attention of the plaintiff all the time. The learned Judges make a point of the fact that no reply *in writing* was sent to plaintiff's letter of the 18th December. That was obviously due to the fact that the whole situation was cleared up when Mr. Brayne met the plaintiff on the 20th and that is what D-7 records. The plaintiff's query (in his letter of the 18th December) as to whether the new documents relate to the old charges or whether there are any definite allegations which bear on the charges, etc., is to say the least disingenuous, because the purpose and use of these new documents have been explained to him in Ex. H. P.-21. Anyhow the matter was made clearer by the explanation given by Mr. Brayne on the 20th December.

There is little substance in the argument that the plaintiff has been prejudiced because no questions were put to him with reference to the new documents nor any information given to him as to the inferences which Mr. Brayne was inclined to draw from these documents. The evidence already referred to in some measure furnishes the answer. On the 9th December, the plaintiff requested that he might not be asked any questions with regard to the new documents (as recorded in Ex. H. P.-29). Between the 12th and the 20th December he had been furnished with copies of relevant portions of these documents and had studied them. On the 20th December the interview lasted about 3 hours and Ex. D-7 records "Mr. Lall has addressed me about the case". This must relate to the "merits" because the earlier paragraphs of the order deal with the objections to "procedure". Plaintiff in his evidence admits that "on the 2nd January Mr. Brayne discussed one document with me". His only apprehension was that Mr. Brayne "might have several more documents of which I had no knowledge". The report is not based on any documents not disclosed to the plaintiff. Even assuming that no questions had been put to the plaintiff by Mr. Brayne with reference to the disclosed documents, it has to be remembered that the charges served on the plaintiff had themselves indicated the *prima facie* inference which the documents there referred to, interpreted in the light of the surrounding circumstances, suggested. The further inquiry, was undertaken, on the suggestion of Mr. Anderson, only to see whether the *prima facie* adverse inference to be drawn from plaintiff's conduct was rebutted either by any evidence in justification of the plaintiff's conduct or by any evidence showing that the plaintiff was usually severe and rough in dealing with all his subordinates. The later evidence is thus not

in any sense incriminating evidence or evidence intended to prove the charges ; it was rather in the nature of evidence calculated, if possible to exculpate the plaintiff. That the plaintiff was himself aware of the value of that kind of evidence is shown even by his answers to the charges. Thus, in answering Charge No. 7, he refers to the remarks made by his predecessor regarding Khem Chand (one of the clerks punished by him) as proof that that clerk was really deserving of punishment ; in respect of one or two other clerks he mentions having heard that they were making money by supplying copies of records privately to the applicants. In his statement before Mr. Anderson, he said (dealing with Charge No. 6) that he had heard complaints against some of them and made inquiries about them from Ch Radha Kishan a leading lawyer of Multan. Such items of evidence are in the nature of justification or exculpation ; but the plaintiff stated at the outset that he did not want any oral inquiry and he never afterwards asked for any of his alleged informants being examined. This certainly does not show that he did not understand the bearing or value of such evidence. I am unable to appreciate the force of the argument (based apparently on section 342 of the Criminal Procedure Code) that it was Mr. Brayne's duty to question the plaintiff with reference to what appeared against him in the evidence. The new documents were in no sense evidence adverse to the plaintiff. They only failed to remove the *prima facie* adverse inference which the plaintiff's conduct interpreted in the light of the surrounding circumstances suggested.

C. It is true that when the plaintiff received a letter from Mr. Brayne suggesting that the inquiry might start early in December, the plaintiff expressed a desire to have it started after the Christmas. But we hear nothing further about this thereafter and whatever personal inconvenience this might have involved to the plaintiff (specially because of his touring duties about this time), there is no trace in the evidence of anything like embarrassment to the plaintiff on this account. He no doubt felt annoyed or (as he said) even humiliated by the thought that there was to be a further inquiry at all and this might have naturally upset him but that is a different matter. If his touring duties interfered with the conduct of his defence, we find no such complaint and he made no attempt to take leave to enable him to conduct his defence properly. Indeed, when one bears in mind the nature of Mr. Brayne's inquiry, there was really not much for the plaintiff to do beyond what the evidence shows that he has done. There is no force in

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the argument that Mr. Brayne did in 2 or 3 days what Mr. Anderson expected might take 15 days to do. We have no means of knowing what Mr. Anderson intended to do ; but the plaintiff has not shown and we have not been able to see what there was in the case that required more time than Mr. Brayne actually spent on it. An observation of the learned Judges suggests a possible misreading of one of the paragraphs of Ex. D.-7. They seem to accept the plaintiff's contention that "even on the 20th December.....documents were still in course of collection". The reference in Ex. D.-7 to "the documents sent for" is, I think, to the two documents referred to earlier as asked for by the plaintiff. The last paragraph itself shows that if they had contained anything material, plaintiff would have been allowed to say what he wished to say about them. Presumably they contained nothing and we therefore hear nothing more about them. The correspondence shows that Mr. Brayne gave to the plaintiff every facility that it was in his power to give and never refused any request made by the plaintiff except when higher authority prevented his complying with such a request.

*D.* I have not been able to understand what the learned Judges had in mind, when they spoke of a possible view that "Mr. Brayne was receiving evidence behind the back of the plaintiff". The observation is made when they refer to a confidential notebook kept by the plaintiff and referred to in Mr. Brayne's report. Even assuming (as hinted by plaintiff) that this book could not have remained in the Court house but must have been given to Mr. Brayne by Chaman Lal, nothing turns on it, so long as no question has been raised as to its genuineness nor as to the plaintiff's knowledge of its existence or its contents. The book itself contains only a few entries and copies of all the entries were sent to plaintiff along with Ex. H. P.-65 (it is item 23 of the list attached to that letter). There is nothing in the document to tell against the plaintiff and it is not correct to speak of Mr. Brayne using it *against* the plaintiff. It contains no more relevant information than is found in plaintiff's statement before Mr. Anderson in respect of Charge No. 6. If anything, it is more favourable to him in that it includes Akbar Ali the Examiner among his informants. Mr. Brayne's characterisation of the information therein contained as "hearsay" is confirmed by one of Mr. Lall's own entries (which formed the basis of the charge), where speaking of disciplinary action against the clerks he adds: "I also have heard complaints against them". I do not see that it was Mr.

Brayne's duty to ascertain what inquiries Mr. Lall had made about the character of these clerks, when Mr. Lall himself did not ask his informants to be examined. Whether or not Mr. Brayne drew the right inference from these entries is not a matter for the Court. Even if it should be held that Mr. Brayne should have examined certain witnesses before coming to certain conclusions that would not amount to a denial of opportunity to the plaintiff to show cause, unless the plaintiff had desired those witnesses to be examined but they were nevertheless not examined.

I have discussed the main grounds set forth in support of the High Court's finding and I do not ignore the possibility that though each circumstance may not be serious by itself, their cumulative effect may be considerable. I think the circumstances of the case do not individually or collectively warrant the conclusion that the plaintiff has not had a reasonable opportunity of showing cause against the charges during the time of Mr. Brayne's inquiry. It must be remembered that after all there is little complexity about the case; the plaintiff pleaded guilty to Charges 1 and 2 and even as to Charge No. 3, he admitted the relevant facts though he pleaded that he acted under a mistake; on Charge 4 he has been exculpated. As to Charges 5 to 8, there is no dispute about the facts themselves; the only question was whether, as the circumstances suggested, the plaintiff acted vindictively against the clerks concerned, because they had questioned the plaintiff's partiality to his wife's relation or whether he had other reasons or justification for dealing with them in that manner. It is difficult to appreciate the force of the argument that the plaintiff who had been a District and Sessions Judge himself did not understand the bearing of various facts and circumstances on one aspect or the other of the case.

As I am of the opinion that the finding on issues 4 and 5 should be against the plaintiff, it would follow that he is not entitled to any relief in this suit.

*By the Court.*—In accordance with the opinion of the majority of the Court it is ordered that, in place of the order of the High Court, there shall be substituted an order declaring that the plaintiff Mr. Lall was wrongfully dismissed from the Indian Civil Service on the 4th June, 1940, but such substituted order shall not affect the order as to costs made by the High Court and it is further ordered that the case be remitted to the High Court with a direction that the High Court do take such action in regard

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to any application by Mr Lall for leave to amend to claim damages as to the High Court shall seem right in view of the judgment of, and the remarks contained in the judgment of, the majority of this Court.

Except as aforesaid, the appeal of the Secretary of State for India is dismissed with costs, such costs to be taxed by the Taxing Officer of this Court.

The cross-objections are dismissed. No order is made as to the costs of the cross-objections.

Leave to appeal to His Majesty in Council refused.

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*Appeal and Cross-objections dismissed :  
 Case remitted.*

## ORIGINAL CIVIL.

*Before Mr. Justice N. A. Khundkar.*

MANINDRA NATH MUKHERJEE

v.

MATHURADAS CHATTURBHUI.\*

Civil.  
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*Damages—Negligence—Duty, breach of—Res ipsa loquitur—Vis major—  
 Damages, how assessed*

A duty is cast upon a person who put on his land something which was dangerous if it escaped to the land of another, to keep the thing on his own land at his own peril, and, if it escaped, then he was answerable for the consequences, whether the escape was due to negligence or not : *Rylands v. Fletcher* (1).

The proprietor of property abutting on a highway is under a positive duty to keep his property from being a cause of danger to the public.

The act of God offers a defence : *Nichols v. Marsland* (2).

The definitions of negligence given by Judges bring into prominence the element of a duty which the defendant owes to another person. That another person is the person who is so closely and directly affected by the acts of the defendant that he ought reasonably to have them in contemplation as being so affected when the defendant was directing his mind to the acts or omissions which are called in question : *Donoghue v. Stevenson* (3). The essentials of negligence are given by Professor Winfield in his Text-book on the Law of Tort as follows : "Negligence as a tort is a breach of a legal duty to take care which results in damage undesired by the defendant to the plaintiff. Thus its ingredients are : (a) legal duty on the part of A towards B to exercise care in such conduct of A as falls within the scope of duty. (b) Breach of duty. (c) Consequential damage to B."

\* Original Civil Suit No. 1667 of 1943.

(1) (1868) L. R. 3 H. L. 330.

(2) (1875-76) L. R. 10 Ex. 255; 2 Ex. D. 1.

(3) (1932) A. C. 562 (580).

Where a heavy object is suspended over a high way and it must fall into it unless supported by artificial means which can only be kept in order by the person in possession of the premises such person is bound absolutely to maintain the attachments.

The consideration which may be permitted, in circumstances where they arise, to influence an assessment of damages includes (a) pain and suffering, (b) loss of earnings or loss of a prospect of lucrative employment and (c) a shortened expectation of life provided that life held a positive measure of happiness.

The defendant is the proprietor of a motion picture exhibition establishment. The portion of the building which abuts on the street is one-storied. On the roof of this, about 4 feet from its western edge, overlooking the street, stands a sky sign which is more or less permanent structure consisting of steel frame held firmly in place in an upstanding position by means of masonry and iron attachments. It is 12 feet high by 25 feet wide. On this framework and firmly attached to it in a vertical position there is galvanized iron sheeting, the surface of which, facing westwards towards the street, was intended to carry advertising designs. The galvanized sheeting covers the whole surface of the framework. Banners were displayed from the sky sign. There is in the framework of the sky sign no contrivance by means of which such banners would be held firmly and securely in place. The banners were held against the galvanized sheet by means of cheap coir ropes which were fastened to the four corners of the wooden frame which contained the cloth design and the ropes were then carried over and under the metal frame of the sky sign and knotted to certain angles and iron rods behind. The lower portion of the wooden frame of the banners did not rest on the ground.

A banner measuring 12 feet in length and 3½ feet in width, within a wooden frame, fell from its position against the sky sign, on the plaintiff, who was passing along the pavement. The wooden frame struck him on the head, he sustained a cut thereon, which was severe.

The defence was that there was no negligence on his or his servant's part and it was the act of God.

Held, that the defendant was liable, upon the principle in *Rylands v. Fletcher* (1). There was negligence on the part of defendant's servants for which he was responsible in law, inasmuch as proper care was not taken to secure the banner in such a way as to prevent it from being blown into the street during monsoon weather. The presumption of want of due care on the part of the defendant or his servants, which the maxim of *res ipsa loquitur* raises against him was not rebutted. The banner fell in a wind which was not above 27 miles per hour in velocity.

Cases on the point reviewed.

The following judgment was delivered by

**Khurdkar, J.:**—This is an action for damages for injury caused to the plaintiff by the fall, from the roof of the defendant's premises, of a Cinema advertising device, called a banner, which is an article made of cloth within a wooden frame. According to

(1) (1868) L. R. 3 H L. 330.

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the defendant's witness, Amitava Roy, the frame is of pinewood 2 inches wide by  $\frac{1}{8}$  an inch thick.

The defendant is the proprietor of a motion picture exhibition establishment called the Rupali Cinema situated in Ashutosh Mukerjee Road. The portion of the building which abuts on the street is one-storied. On the roof of this, about four feet from its western edge, overlooking the street, there stands a sky sign which is a more or less permanent structure consisting of a steel frame held firmly in place in an upstanding position by means of masonry and iron attachments. It is 12 feet high by 25 feet wide. On this framework and firmly attached to it in a vertical position there is galvanized iron sheeting, the surface of which, facing westwards towards the street, was intended to carry advertising designs. The galvanized sheeting covers, according to the defendant's manager, B N. Basu Mullick, the whole surface of the framework. The defendant obtained a license to erect this sky sign from the Calcutta Municipality in December 1933. The plan which he submitted along with his application for a license was a plan of the construction above described. It did not show any specific advertising sign as a part of the construction, although the definition of a sky sign under section 3, clause (65) of the Calcutta Municipal Act, for which, under the Act, a license has to be taken out, includes the advertising sign itself and not the framework only. The construction described above advertised nothing, and as just stated the intention was that advertising designs would be displayed on or against the galvanized sheeting. It appears that both the defendant and the municipal authorities entertained the idea that paper posters would be pasted on the galvanized sheeting. The evidence is that this was what was frequently done. But the defendant also proceeded to advertise the entertainments provided at the Rupali Cinema in a somewhat different manner. Banners similar to the one with which we are concerned in this case were displayed from the sky sign. There is in the framework of the sky sign no contrivance by means of which such banners could be held firmly and securely in place—no slots, bolts, grooves, flanges or screws. The banners were held against the galvanized sheet by means of cheap coir ropes which were fastened to the four corners of the wooden frame which contained the cloth design, and these ropes were then carried over and under the metal frame of the sky sign, and knotted to certain angles and iron rods behind. The lower portion of the wooden frame of the banners did not rest on the ground.

On the 5th July, 1943 at about 7-15 P. M. a banner (produced in Court and found to measure twelve feet in length and three and half feet in width) within a wooden frame, fell from its position against the sky sign of the Rupali Cinema. A very narrow space—according to the evidence for the defendant, four feet—intervenes between the sky sign and the edge of the roof, so that there was nothing to intercept or break the fall. The contraption fell on the plaintiff, who was passing along the pavement. Apparently the wooden frame struck him on the head, for he sustained a cut thereon, which the medical evidence has described as severe, and which bled profusely. On behalf of the defendant it was sought to be proved that the plaintiff was struck not by the banner but by a corrugated iron sheet, described as a "shade", one or more of which fell at the same time, weather being stormy, from the roof of an adjoining shop. The evidence in support of this suggestion is totally insufficient, and as a defence it was indeed not seriously pressed.

The manager of the Cinema establishment, B. N. Basu Mullick who has deposed as a witness for the defendant, came out on to the pavement, and his evidence is that he invited the plaintiff to come into the Cinema, but the plaintiff declined. Three constables of the armed police who were off duty, and were passing by, went to the plaintiff's assistance and rendered first aid. By one of them he was removed to the Sambhu Nath Pandit Hospital, where he was bandaged and put to bed. As haemorrhage continued, an operation had to be performed to tie the severed blood vessels, late at night. The plaintiff remained in the hospital for five days. His case is that, after his discharge, he was bed-ridden for about one month during which period he was attended on daily by Dr. A. M. Datta. His case further is that he has had pain and suffering both mental and physical; his general health which was good before the occurrence has been seriously undermined, and his expectation of life shortened. The accident has injuriously affected his efficiency and capacity for work, and his chances of promotion to a higher official post than that which he at present holds have in consequence disappeared. He claims Rs. 10,450 as damages under the following heads:—

|                                                                                |     |     |            |
|--------------------------------------------------------------------------------|-----|-----|------------|
| (1) Doctors fees                                                               | ... | ... | Rs. 240    |
| (2) Cost of medicine and special diet...                                       | ... | ... | Rs. 200    |
| (3) Cost of conveyance for going to and returning from Hospital                | ... | ... | Rs. 10     |
| (4) For pain and suffering, shortened expectation of life and permanent injury | ... | ... | Rs. 10,000 |

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The defence, apart from the faint suggestion that the plaintiff was not struck by the banner but by something else, is as follows: In the first place it is for the plaintiff to establish that there was negligence on the part of the defendant or his servants which caused the fall of the banner. Not only has the plaintiff not established this, but the evidence adduced on behalf of the defendant shows that all reasonable care was exercised by the defendant's manager who personally supervised the tying of the banner to the sky sign frame on the 12th June 1943. A new rope purchased on June the 11th was used. On July the 5th, the manager examined the banner and found it in position and intact. Each of the four corners of the frame of the banner was tied to the sky sign by 3 strands of this rope which was securely knotted to the supports of the sky sign frame. No one could be expected to do more, and the banner fell because of a storm of unusual severity which occurred in the afternoon of the 5th July. The injury which the plaintiff sustained was not severe and he is not entitled to any damages.

The following issues were framed :—

1. Has this Court jurisdiction to entertain this suit ?
2. Was the plaintiff injured on the 5th of July, 1943 as alleged in the plaint ?
3. What was the nature and extent of the plaintiff's injuries ?
4. Was the occurrence due to storm or to some other unavoidable and unexpected cause ?
5. Was it due to negligence or carelessness of the defendant ?
6. To what relief, if any, is the plaintiff entitled ?

The objection as regards jurisdiction was withdrawn and issue No. 1 does not arise.

The plaintiff's case is that the banner would not have fallen but for the defendant's negligence in not having it properly secured. He has called no evidence, but relies on the doctrine of *res ipsa loquitur* which places the burden of proving due care on the defendant, and contends that for injury caused by the fall from the defendant's premises of an article which was potentially capable of causing harm, and which had been brought into those premises by the defendant, the latter is liable under the principle laid down in *Rylands v. Fletcher* (1).

The defendant denies that the maxim *res ipsa loquitur* or the

(1) (1868) 37 L. J. Ex. 161; L. R. 3 H. L. 330; 19 L. T. 220.

rule in *Rylands v. Fletcher* (1) applies to the facts here established and in the alternative contends that, even if that be so, the evidence adduced by him shows that he took every reasonable precaution, and that the fall of the banner occurred in spite of that and because of a storm, which brings this case within the exception of act of God or *vis major*. To this the plaintiff replies that there was no storm such as would exempt the defendant from liability, and that the fall of the banner was due to the failure of the defendant to take ordinary precautions.

The cause of action is founded on negligence, and as stated, the plaintiff invokes the rule in *Rylands v. Fletcher* (1), which is a special though very strict application of the law relating to negligence, for, as the Lord Justice Clerk, in dealing with *Rylands v. Fletcher* (1), said, in *Chalmers v. Dixon* (2) "I think that culpa does lie at the root of the matter."

Alderson B described negligence as "the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do": *Blyth v. Birmingham Waterworks Co.* (3). This is the definition of negligence most often quoted, but Beven in his well known work on Negligence considers that, though as a description it is invaluable, the formula is too wide for a definition. Pollock, in his book on Torts, states with reference to this definition, that "we have always to remember, that negligence will not be a ground of legal liability unless the party whose conduct is in question is already in a situation that brings him under the duty of taking care."

In *Heaven v. Pender* (4), Brett M. R. laid down the following definition of negligence:—"Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes a duty of observing ordinary care and skill by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property."

In *Vaughan v. Taff Vale Ry. Co.* (5), Willes J. defined negligence as "The absence of care according to the circumstances; and Bowen L. J., in *Thomas v. Quartermaine* (6), said that it was

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(1) (1868) 37 L. J. Ex. 161; L. R. 3 H. L. 330; 19 L. T. 220.

(2) (1876) 3 R. 461 (464).

(3) (1856) 11 Ex. 781 (784).

(4) (1883) 11 Q. B. D. 503 (507).

(5) (1860) 5 H. & N. 679 (688).

(6) (1887) 18 Q. B. D. 683 C. A. (694).



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simply "neglect of some care which we are bound by law to exercise towards somebody."

These definitions bring into prominence the element of a duty which the defendant owes to another person. Who that person may be, is indicated by Lord Atkins in *Donoghue v. Stevenson* (1). "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

Professor Winfield in his "Text-book on the Law of Tort" has expressed the essentials of negligence in the following words :—

"Negligence as a tort is a breach of a legal duty to take care which results in damage undesired by the defendant to the plaintiff. Thus its ingredients are : (1) A legal duty on the part of A towards B to exercise care in such conduct of A as falls within the scope of duty. (2) Breach of duty. (3) Consequential damage to B."

In determining whether the first ingredient here mentioned is established in the present case, one has to ask whether the defendant, an occupier of premises adjoining a public thoroughfare, owed any duty to the plaintiff who was a passer-by thereon. In considering whether the second ingredient is present, one has to start with the fact that the plaintiff has offered no evidence to show that the defendant had kept the banner on the roof of the premises in a manner which argued want of due care. It has accordingly to be seen whether want of such care may be inferred from the mere fact that the banner fell into the street, that is to say, whether the maxim *res ipsa loquitur* applies.

After referring to the cases which illustrate this maxim, Pollock (Law of Torts, 14th Ed. at p. 418) says :—

"Construing the principles affirmed in those authorities, we see that the proprietor of property abutting on a highway is under a positive duty to keep his property from being a cause of danger to the public by reason of any defect either in structure, repair, or use and management, which reasonable care and skill can guard against."

(1) (1932) A. C. 582 (580).

This learned author explains the maxim *res ipsa loquitur* as exemplified in the decided cases in the following words: (p 415) "Where damage is done by the falling of objects into a highway from a building, the modern rule is that the accident, in the absence of explanation, is of itself evidence of negligence. In other words the burden of proof is on the occupier of the building. If he cannot show the accident was due to some cause consistent with the due repair and careful management of the structure, he is liable."

In Salmond's Law of Torts (9th Ed. at p. 470) the matter was stated in this general form:—"The rule that it is for the plaintiff to prove negligence, and not for the defendant to disprove it, is in some cases one of considerable hardship to the plaintiff; because it may be that the true cause of the accident lies solely within the knowledge of the defendant who caused it. The plaintiff can prove the accident, but he cannot prove how it happened so as to show its origin in the negligence of the defendant. The hardship is avoided to a considerable extent by the rule *res ipsa loquitur*. There are many cases in which accident speaks for itself, so that it is sufficient for the plaintiff to prove the accident and nothing more. He is then entitled to have the case submitted to the jury, and it is for the defendant, if he can, to persuade the jury that the accident arose through no negligence of his."

This maxim is really a rule of evidence relating to the burden of proof and may be compared with the provisions of section 106 of the Indian Evidence Act.

To continue the quotation from Salmond:—"The maxim *res ipsa loquitur* applies whenever it is so improbable that such an accident would have happened without the negligence of the defendant that a reasonable jury could find without further evidence that it was so caused.....On the other hand, if the defendant produces a reasonable explanation, equally consistent with negligence and no negligence the burden of proving the affirmative, that the defendant was negligent and that his negligence caused the accident, still remains with the plaintiff.

I would refer briefly in their historical sequence to the important cases which illustrate the maxim *res ipsa loquitur*.

In *Byrne v. Boadle* (1), a barrel of flour fell from a window in the defendant's warehouse and knocked down and injured the plaintiff who was walking below along the public street. It was

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(1) (1863) 2 H & C. 722.

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held that this was enough to raise against the defendant a presumption of negligence which it was for him to rebut, it being the duty of persons who keep barrels in a warehouse to see that they do not roll out. Pollock C. B. said, (p. 727): "There are many accidents from which no presumption of negligence can arise, but I think it would be wrong to lay down as a rule that in no case can a presumption of negligence arise from the fact of an accident."

In *Scott v. London and St. Katherine's Docks Co.* (1), the plaintiff was a Customs House Officer, who, while on his way from one part of the docks to another, was knocked down by some bags of sugar which fell on him from a crane which was lowering them from the defendant's warehouse. Erle C. J. in the Court of Exchequer Chamber said: "Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of thing does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

In *Briggs v. Oliver* (2) a packing case belonging to the defendant which was insecurely propped against his premises fell on the plaintiff. The majority of the Court, Pigott & Bramwell B held that these facts constituted evidence of the defendant's negligence. "Packing-cases carefully placed in a proper position do not naturally tumble down of their own accord; and we have no right to assume that the fall of this packing-case was caused by the act of some one who was not the defendant's servant."

*Kearney v. London, Brighton & South Coast Railway Co.* (3) which was chronologically a later case than *Rylands v. Fletcher* (4) extended the principle of *Byrne v. Boadle* (5) to the falling of a brick from the arch of a railway bridge in consequence of which a person walking on a highway spanned by the bridge received an injury. A train had passed immediately before. There was no evidence as to the condition of the bridge and the brickwork, except that after the accident other bricks were found to have fallen out. The maxim *res ipsa loquitur* was held to apply. "The defendants were under the common law liability to keep the

(1) (1865) 3 H. &amp; C. 596; 34 L. J. Ex. 220.

(2) (1866) 4 H. &amp; C. 403; 35 L. J. Ex. 163.

(3) (1871) L. R. 6 Q. B. 759; 40 L. J. Q. B. 285.

(4) (1868) L. R. 3 H. L. 330.

(5) (1863) 8 H. &amp; C. 722.

bridge in safe condition for the public using the highway to pass under it." The fact that a brick was loose and "fell out of the pier of the bridge without any assignable cause except the slight vibration caused by a passing train" afforded a *prima facie* presumption that the defendants had not used reasonable care and diligence to keep the bridge in safe repair.

I come now to *Rylands v. Fletcher* (1) which, strictly speaking, is not an illustration of the mere principle of *res ipsa loquitur*, because the liability arising from that principle can be repelled by proof that the defendant was not negligent, whereas under the rule in *Rylands v. Fletcher* (1) it is no defence to say that the defendant took every possible precaution to prevent the escape of the injurious thing. The facts of the case are sufficiently stated in the head note of the report :—

"A was the lessee of mines. B was the owner of a mill standing on land adjoining that under which the mines were worked. B desired to construct a reservoir and employed competent persons, an engineer and a contractor, to construct it. A had worked his mines up to a spot where there were certain old passages of disused mines ; these passages were connected with vertical shafts which communicated with the land above and which had also been out of use for years, and were apparently filled with marl and earth of the surrounding land. No care was taken by the engineer or contractor to block up these shafts, and shortly after water had been introduced into the reservoir it broke through some of the shafts, flowed through the old passages and flooded A's mine :

"Held, that A was entitled to recover damages from B in respect of this injury."

The Court of Exchequer had by a majority decided in favour of the defendant. The Court of Exchequer Chamber unanimously reversed this decision and held the defendant liable, and the House of Lords affirmed their decision. The judgment of the Court of Exchequer Chamber was delivered by Blackburn J. It was quoted with approval by Lord Chancellor Cairns in the House of Lords, and has become classical. Blackburn J. said :—

"We think that the true rule of law is, that the person who for his own purposes brings on his lands, and collects and keeps there, anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He

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can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. ....; and it seems but reasonable and just that the neighbour who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there, no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority this we think is established to be the law whether the things so brought be beasts, or water, or filth, or stench.

I shall deal with the act of God or *vis major* later on, in its proper place, in the sequence of the present argument, but here I would pause to call attention to the fact that Blackburn, J. expressly mentions it as a possible defence to the principle of liability which he was expounding.

As has been elsewhere pointed out (see Pollock 14th Ed., p. 393) "act of God does not necessarily mean an operation of natural forces so violent and unexpected that no human foresight or skill could possibly have prevented its effects. It is enough that the accident should be such as human foresight could not be reasonably expected to anticipate; and whether it comes within this description is a question of fact."

It is this element which distinguishes *Nichols v. Marsland* (1) cited on behalf of the defendant in the present case from *Rylands v. Fletcher* (2), and I will refer to it later when I come to deal with the alternative answer of the defendant which is that the fall of the banner was due to a storm.

At the moment I am considering the first position upon which the defence has taken its stand, which is that the facts of the present case take it completely out of the principle of *Rylands v. Fletcher* (2), and also the rule expressed in the maxim *res ipsa loquitur*, so that the onus of proving negligence by affirmative

(1) (1875) L. R. 10 Ex. 255; 46 L. J. Ex. 174.

(2) (1863) L. R. 3 H. L. 330.

evidence of acts or omissions by the defendant showing want of due care lies on the plaintiff.

I shall refer now to cases which illustrate the strict rule of liability enunciated in *Rylands v. Fletcher* (1), and in some of which the maxim *res ipsa loquitur* also has generally been applied.

Before I do so, however, I will call attention to what, I think are the essential features of the cases in which the rule of strict liability of which *Rylands v. Fletcher* (1) is a type has been applied.

They are expressed in the following words :—

By Lord Moulton in *Richards v. Lothian* (2) ; "It must be some special use bringing with it increased danger to others....."

By Atkin L. J. in *Behodere Fish Guano Co. v. Rainham Chemical Works* (3) ; "Where a person brings upon land of which he is in *de facto* possession for purposes of his business dangerous materials which would not naturally be upon the land, he is under an obligation to keep those materials under control, so as not to cause mischief to his neighbours."

By Scott L. J. in *Hale v. Jennings Bros.* (4) ; "The fundamental rule of the principle is that the liability attaches because of the occupier of land bringing on to the land something which likely to cause damage if it escapes."

These observations cover the cases of articles potentially dangerous, that is to say, such as are likely to cause injury upon escaping, or while in the process of escaping, from their places of confinement.

In *Tarry v. Ashton* (5), the defendant was the occupier of a house from which a lamp projected over the street, and he had employed a competent person who was not his servant to put it in repair. The lamp fell and injured the plaintiff. It was found as a fact that there had been negligence on the contractor's part, and that the lamp had fallen because of the decayed condition of the attachment of the lamp to its bracket, which had escaped notice. Lush and Quinn JJ. held that the defendant was liable on the ground that although he had employed an apparently competent person to repair the lamp, yet that did not excuse him from his duty to maintain it in a safe condition. This view is undoubtedly an application

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(1) (1868) L. R. 3 H. L. 330.

(2) [1913] A. C. 263 (280) ; 82 L. J. P. C. 42 (J. C.)

(3) [1920] 2 K. B. 487 (562).

(4) (1938) 1 All. E. R. 579.

(5) (1876) 1 Q. B. D. 314 (320) ; 45 L. J. Q. B. 260.

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of the rule in *Rylands v. Fletcher* (1). In *Beven on Negligence* (4th Ed. p 22) the case is cited as an illustration of the proposition that, if "the injury had arisen from an ordinary casualty of the highway, negligence in addition to accident would have to be proved to affect the defendant with liability. So soon as it is clear that the accident is not one of those incident to the highway, the occurrence of it raises a presumption of the defendant's default."

This observation has to be borne in mind in connection with some of the cases cited by Mr. Mukerjee for the defendant which are cases in which injury had resulted from street accidents.

In *Attorney General v. Cory Brothers & Co.* (2) a colliery company had deposited colliery debris on a hillside under license from the owners of the land. After heavy rain a landslide occurred. As the evidence showed that the landslide was caused by the weight of the debris, the colliery company were found liable under the rule in *Rylands v. Fletcher* (1) for damage caused by the escape of the debris.

*Shiffman v. Order of St. John* (3) was a case in which the Order of St. John of Jerusalem had, on the occasion of a national holiday, erected a casualty tent in a public park where large crowds gathered. Outside the tent they had put up a flag pole which was insecurely kept in position by guy ropes. As the result of children, who could not be kept away, swinging from the ropes, the pole fell and injured the plaintiff. In holding that the defendants were liable to pay damages on the ground of negligence, Atkinson J. said:—"I do not think it is necessary to decide it, but there is another ground upon which I think liability may well rest. I cannot myself see why this is not within the rule in *Rylands v. Fletcher* (1). The defendants erected something exceptional, something which would be easily caused to fall, and something which, if it fell, was likely to do mischief to others, for if it fell, it was certain to fall on land of which they were not in occupation, and upon which the public had a right to be." The italics, which are mine, bring out points of close resemblance with the facts out of which the present action has arisen.

In *Hale v. Jennings Bros.* (4) the defendant had erected in a public amusement park an apparatus similar to a roundabout called a

(1) (1868) L. R. 3 H. L. 330.

(2) [1921] 1 A. C. 521.

(3) (1936) 1 All. E. R. 557.

(4) (1938) 1 All. E. R. 579.

Chair-O-Plane. While this was in the process of rotation one of the chairs became detached and struck and injured the plaintiff who was the proprietor of a neighbouring shooting-gallery. In holding that the defendant was liable on the fundamental principle enunciated in *Rylands v. Fletcher* (1), the Court of appeal found that the chair-o-plane was an inherently dangerous thing in the sense that it was likely to cause damage if it escaped.

*Jones v. Festionog Rly Co.* (2) was a case of damage caused by sparks from a railway engine. Blackburn J. in this case said :— "The general rule of common law is correctly given in *Fletcher v. Rylands* (1), that where a man brings or uses a thing of a dangerous nature on his own land he must keep it in at his peril; and is liable for the consequences if escapes and does injury to his neighbour. Here the defendants were using a locomotive engine with no express parliamentary powers making lawful that use, and they are therefore at common law bound to keep the engine from doing injury, if the sparks escape and cause damage, the defendants are liable for the consequences, though no actual negligence be shown on their part.

This case was followed in *Powell v. Fall* (3), which was a case of damage caused by sparks from a traction engine.

In *North Western Utilities v. London Guarantee & Accident Co.* (4), a public utility company was held liable for the destruction of a building by a fire occasioned by the escape of gas from one of its pipes which had been fractured, although the fracture was caused by the operations of the city authority in constructing a sewer. It was stated in this case that the rule in *Rylands v. Fletcher* (1) was not limited to cases where the defendant had been carrying or accumulating the dangerous thing on his own land.

I turn now to the cases cited by Mr. Mukerjee on behalf of the defendant in his endeavours to show that neither the maxim *res ipsa loquitur* nor the rule in *Rylands v. Fletcher* (1) apply to the facts of the present case.

In *Crisp v. Thomas* (5) the plaintiff was a scholar in a voluntary school who was injured by the fall of a blackboard from its case, and

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(1) (1868) L. R. 3 H. L. 330.

(2) (1868) L. R. 3 Q. B. 733; 37 L. J. Q. B. 214.

(3) (1880) 5 Q. B. D. 597; 49 L. J. Q. B. 428.

(4) [1935] A. C. 109.

(5) (1890) 63 L. T. 756.



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the action was for damages on the ground of negligence on the part of a girl who, deputising for a teacher, had put the blackboard on the easel. It was held that the mere fall of the blackboard was not evidence of negligence. Lord Esher M. R. said: "The application of the maxim *res ipsa loquitur* depends upon whether the judge in each particular case can see that the mere fact of a thing happening is more consistent with there having been negligence than not. The facts of the case here are not more consistent with negligence than with accident." Lopes L. J. distinguished the case from that of *Scott v. London & St. Katherine's Docks Co.*, (1) by saying that what happened in the latter case and other similar cases was more consistent with there having been negligence in some one than otherwise. Kay L. J. observed that there was no comparison between the case and *Scott's* case (1). "To say that every accident in a school is to be likened to that, and to say that there must be negligence whenever an accident happened, is a contention quite untenable. It is not a dangerous thing to use a blackboard."

The *ratio decidendi* of *Crisp v. Thomas* (2) in substance was that a blackboard is not a potentially dangerous article. The contrast between the facts in *Crisp's* case (2) and those in *Scott's* case (1) being noted it remains only to call attention to certain admitted circumstances of the present case, such as the size, shape and material of the thing called a banner, the proximity of the position which it had occupied to the public street, and the height from which it fell. These circumstances make it impossible for me to hold that *Crisp v. Thomas* (2) has any application here.

*Hammash v. White* (3), is a case which has been illuminatingly discussed in various passages in *Beven on Negligence*, and I do not think I can do better than to quote what that learned and distinguished commentator says about this case:—"Defendant in order to try a horse which he had bought at Tattersoll's the day before was riding it in Finsbury Circus at a slow pace. The horse was restless and the defendant held the reins tightly, omitting nothing to avoid an accident. The horse, however, swerved on to the pavement, where the deceased was walking, knocking him down, and injured him fatally. An action was brought under Lord Campbell's Act. The Court thought the facts did not disclose any cause of action..... 'I am of opinion', said Erle, C. J.,

(1) (1865) 3 H &amp; C. 596; 34 L. J. Ex. 220.

(2) (1890) 63 L. T. 756.

(3) (1862) 142 E. R. 926; 11 C. B. (N. S.) 588; 31 L. J. C. P. 129.

that a man is not to be charged with want of caution because he buys a horse without having had any previous experience of him. There must be horses without number ridden every day in London of whom the riders know nothing. A variety of circumstances will cause a horse to become restive. The mere fact of restiveness is not even *prima facie* evidence of negligence.

The witness who deposed to the fact of the defendant being on the footpath, also deposed to the fact that he was there unwillingly, and thus displaced the presumption of negligence that his evidence had raised. The only question was as to the effect of restiveness in a horse unaccompanied by any other fact implying negligence. The decision of the Court in effect was, that the use of horses for riding and driving being recognised, and certain places being proper for them to be used in, while their natural disposition is uncertain, those who ride them do not guarantee against the effects of the waywardness of their dispositions. A doubt has been suggested whether Finsbury Circus was a proper place 'to try' a horse in. Though it was not contested so to be in the year 1862, the point might be disputed to-day. In another passage Bowen distinguishes *Hamrick v. White* (1) from *Byrne v. Boodle* (2), by pointing out that in the one case the cause of injury was animate and in the other inanimate. "A man who has barrels on his premises is bound to put them in such a position that they will not fall out on the highway; if they do, as they have no power of motion in themselves, the very fact of movement argues negligence. A man who has a horse is also bound to take care that he does not do damage; but since the horse has a power of motion of his own which it is not necessary for the owner in all cases to provide against his exerting, an accident caused by the exercise of this power does not necessarily argue want of care in the owner; for the motion of a horse may arise from his own unforeseen impulse, in which case the owner is not liable; thus, while in the case of a barrel it is enough to show that it moved from its position and caused the injury, in the case of a horse mere unexplained movement will not warrant the same conclusion."

The passages I have quoted make it sufficiently plain that different considerations arise, and the principles of liability are not the same when a horse is ridden through a thoroughfare, and when a large advertising device falls from a sky-sign into the public roadway.

(1) (1862) 142 E. R. 926; 11 C. B. (N. S.) 588; 31 L. J. C. P. 129.

(2) (1863) 2 H. & C. 722; 33 L. J. R. 13.

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*Holmes v. Mather* (1) was another case of injury resulting from equine vagaries. A groom was driving his master, the defendant, in a carriage drawn by a pair of his master's horses, when the animals bolted, and in spite of the best endeavours of the groom to bring them under control, they knocked down and injured the plaintiff. It was held that the action was not maintainable. Bramwell B. said:—"If I am being run away with, and I sit quiet and let the horses run, wherever they think fit, clearly I am not liable, because it is they, and not I, who guide them, but if I unfortunately do my best to avoid injury to myself and other persons, then it may be said that is my act of guiding them that brings them to the place where the accident happens: Surely it is impossible." Cleasby B. said:—"I sum up all in these words: In my opinion the horses were not driven there by the defendant's servant, but they went there in spite of him, so far as he directed them at all."

In my judgment *Holmes v. Mather* (1) may be distinguished in the same way as that indicated in the case of *Hammack v. White* (2).

In *Holmes v. Mather* (1), Bramwell B. made the following observation: "For the convenience of mankind in carrying on the affairs of life, people as they go along the roads must expect, or put up with such mischief as reasonable care cannot avoid." This was said with reference to mischief incidental to the ordinary traffic on a highway. Reference has been made above to Beven's comment on *Turry v. Ashton* (3). This author has further remarked (Beven on Negligence, 4th Edition, Page 138): "The maxim *res ipsa loquitur* does not apply to an accident on a highway. Those who go on a highway or have their property adjacent and sustain personal hurt there or damage to their property lying beside it can only show a right to recover by affirmative evidence of fault in the person doing the damage. The fact of an accident raises no presumption. A man crossing the road is knocked down by a cart. Merely to prove this shows no cause of action. The plaintiff must go further and specify some breach of duty on the part of the defendant; the cart was driven too fast, or was on the wrong side of the road, or swerved, or was not properly constructed, or was overloaded—hence the accident: some fact imputing blame as the cause of the accident. It is as much the duty of foot-

(1) (1875) L. R. 10 Ex. 261; 44 L. J. Ex. 176.

(2) (1862) 142 E. R. 926; 11 C. B. (N. S.) 588; 31 L. J. C. P. 129.

(3) (1876) 1 Q. B. D. 314 (330); 45 L. J. Q. B. 260.

passengers attempting to cross a street or road to look out for passing vehicles as it is the duty of drivers to see that they do not run over foot-passengers." See in this connection *Cotton v. Wood* (1) per Erle C. J.

*Wing v. London General Omnibus Company* (2) was a case arising out of an injury sustained by a passenger in a motor omnibus which had skidded on a greasy roadway and struck a lamp post. There was no evidence of negligence on the part of any servant of the defendants in control of the vehicle or of any fault in its construction. The case was conducted on the assumption that, when a road is in a slippery condition, a motor omnibus has a tendency to skid, and it was this circumstance which afforded the basis for the decision of the Court that the defendants were not liable. Vaughan Williams L. J. said: "I do not think that an accident resulting from the tendency of motor omnibuses, however well constructed and designed, to skid is any evidence of negligence or nuisance." Fletcher Moulton L. J. (pp. 663 & 664) observed:—"Without attempting to lay down any exhaustive classification of the cases in which the principle of *res ipsa loquitur* applies, it may generally be said that the principle only applies when the direct cause of the accident, and so much of the surrounding circumstances as was essential to its occurrence, were within the sole control and management of the defendants, or their servants, so that it is not unfair to attribute to them a *prima facie* responsibility for what happened. An accident in the case of traffic on a highway is in marked contrast to such a condition of things. Every vehicle has to adopt its own behaviour to the behaviour of other persons using the road, and over their actions those in charge of the vehicle have no control." At p. 666 there is the following passage in the judgment of Fletcher Moulton L. J.:—"No witness was called to prove either that this particular motor omnibus was or that motor omnibuses generally were unmanageable, or dangerous to such an extent as to constitute a nuisance in the eye of the law, or to call into play the doctrine of *Rylands v. Fletcher* (3)."

What has been said is, I think, sufficient to dispose of any supposed similarity between the present type of case and cases which are concerned with accidents occurring in course of traffic moving in the streets.

(1) (1860) 8 C. B. (N. S.) 568 (571); 29 L. J. C. P. 333.

(2) [1909] 2 K. B. 652.

(3) (1868) L. R. 3 H. L. 330.

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As regards the remaining cases on which Mr. Mukerjee has relied in support of his argument that neither the rule in *Rylands v. Fletcher* (1) nor the doctrine *res ipsa loquitur* apply, the distinction between those cases and a case like the present, which arises out of the escape from the defendant's premises of a potentially dangerous thing brought there by the defendant himself, should be reasonably apparent from a brief statement of the facts of the cases relied upon, and a bare indication of what the decision in each instance really amounted to.

*Stanley v. Powell* (2) was a case illustrative of what has been called 'inevitable accident'. The defendant, who was one of a shooting party, fired at a pheasant. One of the pellets from his gun glanced off the bough of a tree, which was between him and the bird and not in line with the plaintiff, and the pellet accidentally wounded the plaintiff, who was engaged in carrying cartridges and game for the party. The jury found that the defendant was not guilty of any negligence in firing as he did, and Denman J. held that the defendant was not liable for negligence because there was none, nor for trespass to the person because the harm was accidental in the sense that there was no neglect or want of due caution on the defendant's part.

It is interesting to note that Beven (4th Ed. p. 710) has made the following comment upon this decision: "If, then, the reasoning of Denman J., in *Stanley v. Powell* (2) is correct, it is manifest that the contention of the present chapter is wrong, and that in effect the law of England is that a man must in all circumstances be on the alert to avoid receiving injury and cannot, unless in exceptional cases, throw the risk of acting on him doing the act: That the law of England is not so must be apparent to every student of the judgment of Blackburn J., in *Fletcher v. Rylands* (1)."

Inevitable accident, according to Pollock, (Law of Torts, 14th Ed. p. 107), means an accident 'not avoidable by any such precautions as a reasonable man, doing such an act then and there, could be expected to take.'

In *Fardon v. Harcourt-Rivington* (3), Lord Dunedin said:—"People must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities." It is plain that the phrase "fantastic possibilities" was evoked by the special

(1) [1868] L. R. 3 H. L. 330.

(2) [1891] 1 Q. B. D. 86; 60 L. J. Q. B. 531.

(3) [1932] 146 L. T. 391.

facts of that case which were of a most unusual kind. The headnote of the report is in these terms :—

"The defendant parked his saloon car in a street with its back against the pavement. The car was left shut with a dog inside it. There was no evidence that the dog had a vicious propensity. When the plaintiff, who had parked his car near the defendant's car, was walking past the defendant's car the dog, which had been barking and jumping about the car, jumped up against the window in the rear of the defendant's car, smashing a panel, whereby a glass splinter flew out and entered the plaintiff's eye, with the result that the plaintiff lost his eye. In an action for damages for personal injuries :

Held, that the danger of a piece of glass being knocked by a dog out of a small window at the back of the car, and of a splinter of glass hitting a passer-by on the pavement, was such an unlooked for event that no reasonable man could say that a person ought to be convicted of negligence for not taking any precautions against it."

In the House of Lords, Lord Dunedin referred to *Rylands v. Fletcher* (1) as having no bearing on the facts. "*Rylands v. Fletcher*, (1) dealt with the duty cast upon a person who put on his land something which was dangerous if it escaped to the land of another, to keep the thing on his own land at his own peril, and, if it escaped, then he was answerable for the consequences, whether the escape was due to negligence or not ; but there is nothing that is parallel to that circumstance in this case."

In *Jones v. London County Council* (2), the headnote of the report is sufficient to indicate how obviously that case is distinguishable :—  
"The infant plaintiff, who was 17 years of age and was an unemployed person undergoing a compulsory course of instruction at a county council instruction centre, was ordered by the council's instructor, a man of experience, to take part in an organised game called "riders and horses", in which one boy mounted the back of another and endeavoured to bring to the ground the foot of the boy who was acting as "rider" in an opposing pair. During the game the infant plaintiff, who was taking the part of a "horse", fell on the wooden floor and seriously injured his arm. In an action against the Council for negligence, on the ground that the game was so dangerous in itself that to order a boy to play it amounted to negligence, the evidence of the instructor was

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(1) (1868) L. R. 3 H. L. 330.

(2) (1932) 48 T. L. R. 577.

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that for 20 years he had seen the game played without serious accident.

Held, that there was no evidence of negligence, and therefore the action failed."

Scrutton L. J. thought there could hardly be any physical exercise in which an accident might not happen, and to say that physical exercises were dangerous because an accident might happen at some time seemed to go beyond what a jury could reasonably find.

*Donoghue v. Stevenson* (1) was a case which does not in any view help the defendant. The plaintiff in that case had suffered ill effects from drinking ginger beer from a sealed bottle which contained the decomposed remains of a snail. The manufacturer of the beverage was held to be under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article was free from defect likely to cause injury to health.

In *Cutler v. United Dairies Ltd.* (2) the defendant servant while endeavouring to secure his employers' horse which was displaying restiveness in a field, cried out for help, whereupon the plaintiff went over an intervening hedge and attempted to hold the animal, which reared and threw him to the ground thereby injuring him. The horse had been employed to draw the defendants' milk van, and there being evidence that it had bolted on two previous occasions, the jury found that the defendants were negligent in employing that particular horse to draw their van. It was held that the defendants' negligence, if any, could not be said to be the cause of the accident, inasmuch as there was a *novus actus interveniens*—namely the plaintiff's attempt to hold the horse, which he must have known was attended with risk, and therefore that the principle of *volenti non fit injuria* applied and precluded the plaintiff from recovering. Scrutton L. J. observed: "If a horse bolts in a highway and bystander tries to stop it and is injured, the owner of the horse is under no legal liability to the injured person."

The circumstances of fact and the principle of law involved in *Cutler v. United Dairies* (2) render that case plainly inapplicable here.

In *Noble v. Harrison* (3) the facts were as follows:—A branch of tree growing on the defendant's land and overhanging a highway

(1) [1932] A. C. 562.

(2) [1933] 2 K. B. 297.

(3) [1926] 2 K. B. 332.

broke and damaged the plaintiff's vehicle which was passing thereon. It was found as a fact that neither the defendant nor his servants knew that the branch was dangerous, and that the fracture was due to a latent defect not discoverable by any reasonably careful inspection. It was held that the defendant was not liable inasmuch as he had not created the danger and had no knowledge, actual or imputed, of its existence.

The precise scope of this decision and its real ratio are brought out in a passage in the judgment of Rowlat J. in which the cases of *Rylands v. Fletcher* (1) and *Turry v. Ashton* (2) are referred to and distinguished: "There remains one other question—namely, whether, inasmuch as the tree in fact overhung the road, the defendant was not under an absolute obligation to support it. The point is suggested by the judgments of Lush and Quain JJ. in *Turry v. Ashton* (2). In that case a lamp attached to the defendant's premises overhung the highway, and it was held by the two learned judges referred to that he was bound to prevent it falling at his peril. The reasoning proceeds really upon the same lines as that in *Rylands v. Fletcher* (1), and I think, fails to apply to this case on the same grounds. It may be that where a heavy object is suspended over a highway, and must fall into it unless supported by artificial means which can only be kept in order by the person in possession of the premises, such person is bound absolutely to maintain the attachments. But a branch of a tree is not kept from falling by artificial attachments to be maintained by man, but by the natural processes which develop the tree, and it is only when accident or decay interferes that human intervention is required. I see no ground for holding that the owner is to become an insurer of nature; or that the default is to be imputed to him until it appears, or would appear upon proper inspection, that nature can no longer be relied upon."

*Noble v. Harrison* (3) was followed in a very recent case *Cunliffe v. Banks* (4), in which a motor cyclist ran into a tree which had been growing upon the defendant's estate and had, owing to its diseased condition, fallen across the highway. Both cases are distinguishable in the same way. In the present case, it scarcely needs to be stated that the immediate cause of the fall

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(1) (1868) L. R. 3 H. L. 330.

(2) (1876) 1 Q. B. D. 314 (330); 45 L. J. Q. B. 260.

(3) [1926] 2 K. B. 332.

(4) (1945) 1 All. E. R. 459.



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of the banner was the failure of an artificial attachment for which the defendant's servants were responsible, to wit a rope, and there can be no question here of any latent defect in any thing natural or artificial, which was not discoverable by careful inspection.

In *Simons v. Winslade* (1) the plaintiff a customer of a public house, while going through the yard slipped on some vomit, and falling, sustained injuries. The yard had been inspected by the defendant who was the proprietor of the establishment a few hours previously and it was then in good order. It was held that the defendant was not liable.

As regards the maxim *res ipsa loquitur* it is to be noted that the plaintiff gave evidence only of the circumstances in which he fell, and that the defendant did in fact testify that he had inspected the yard prior to the occurrence. As regards the rule in *Rylands v. Fletcher* (2), that question did not arise, as is apparent from the grounds on which the decision was based. Greer L. J., in delivering the judgment of the Court of Appeal said:—"The duty of an 'invitor' towards his 'invitee' was expressed in *Indermaur v. Dames* (3) as follows: "The 'invitee' was entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger of which the occupier knew or ought to have known." We think that there was no evidence which enabled the court to say that the danger to which the plaintiff was put was one of which the defendant either knew or ought to have known. He could only have known of it by keeping a man constantly in the yard of the licensed premises to warn him when any filth was deposited in the yard. That would be to place on the defendant as an 'invitor' a greater duty than he owed to the plaintiff as an 'invitee'".

It is very clear that this case is an illustration of quite another principle from that underlying *Rylands v. Fletcher* (2). It relates to the duty of care which the occupier of premises owes to persons whom he invites into those premises. As Professor Winfield says (Text Book of the Law of Tort, 2nd Ed. p. 610) "It falls short of strict liability of the kind set up in *Rylands v. Fletcher* (2)."

(1) (1928) 159 L. T. 408.

(2) (1868) 3 H. L. 330.

(3) (1866) 9 L. T. Rep. 486; L. R. 1 C. P. 274 (287); 35 L. J. C. P. 184.

*Read v. Lyons* (1) was a very recent decision of the Court of Appeal on which strong reliance was placed by Mr. Mukerji. The relevant facts are stated in the judgment of du Parc L. J. (P. 118): "The appellants in this action were in occupation of a factory at which high explosive shells were made. They managed the factory and controlled the manufacture of the shells. They admit that high explosive shells are 'dangerous things.' The respondent worked in the factory, though not as a servant of the appellants, and while she was there her position was that of an invitee. On an occasion when she was present in the factory a shell exploded, whereby she suffered injuries. No negligence on the part of the appellants was proved, or alleged. It is consistent with the case pleaded, and with the evidence, that they took the utmost care for the respondent's safety. There is no doubt that they were carrying on a lawful business." It was held that the appellants were not liable for damages. On behalf of the respondent it had been argued that the principle of *Rylands v. Fletcher* (2) applied because that principle was not escape from the defendant's land, but escape from the defendant's control, so that there would be liability in the case of injury resulting from non-natural user of the land. As a formulation of the essential principle of liability underlying *Rylands v. Fletcher* (2) and other cases of that type, this argument did not find favour with the Court. Mackinnon L. J. (at P. 117) said with reference to the judgment of Blackburn, J. in *Rylands v. Fletcher* (2): "There can be, in my opinion, no doubt that that doctrine, as so enunciated, was limited to the operation of the course of danger brought by a plaintiff upon his land, if it caused damage outside the limits of his land to the person or property of a neighbour." Referring to *Ponting v. Noakes* (3), du Parc L. J. pointed out (at P. 119) that in that case the Court showed no disposition to extend the rule in *Rylands v. Fletcher* (2) to cover dangerous things which had not escaped from the defendant's land. "There is no instance recorded in the reports of any challenge, either successful or unsuccessful, to the interpretation put upon the rule in *Ponting v. Noakes* (3) until, as recently as 1936, that interpretation was reaffirmed and adopted by Lewis, J. in *Howard v. Furness Houder Ltd.* (4). Du Parc L. J. also observed (at P. 118):—"There can be no doubt that a manufacturer of explosives, which he knows to be dangerous, is under a duty to take a high degree of

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(1) [1945] 1 All. E. R. 106.

(2) (1868) 3 H. L. 330.

(3) [1894] 2 Q. B. 281.

(4) [1936] 2 All. E. R. 781.

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care, but I had supposed it to be well settled that, if he fulfilled that duty, he would not be liable to any person using his premises for the consequences of an accidental explosion." Scott L. J. summed up his conclusions in the following words, which express the gist of the decision in the case:—"In the result I hold that the particular doctrine of strict liability laid down in *Rylands v. Fletcher* (1) has no application to accidents incidental to the process of manufacture occurring to persons present on the premises, whether as servants or as invitees or licensees."

The quotations which I have set out from the judgment should suffice to indicate certain important limits to the *Rylands v. Fletcher* (1) rule which the case of *Read v. Lyons* (2) has brought out. At the same time the words quoted serve also to underline those divergences in the circumstances which render the decision in *Read v. Lyons* (2) inapplicable to the present case. The plaintiff here was not an invitee and was not on the defendant's premises at all, the accident did not occur in any process of manufacture, and the article which caused the injury to the plaintiff, being potentially dangerous, had been brought by the defendant on to his premises, and had escaped therefrom.

That the principle of *Rylands v. Fletcher* (1) is not to be unduly attenuated in consequence of the decision in *Read v. Lyons* (2), is clear from the variety of the circumstances in which the principle has been successfully invoked. It has for instance been applied to the bursting of hydraulic mains. In *Charing Cross Electricity Supply Company v. Hydraulic Power Company* (3), the plaintiff company's underground electric cables were damaged by water escaping from the mains of the defendant company which they had laid under the streets, and which had burst. It was held that in the absence of statutory authorisation the defendants were liable notwithstanding that they had been guilty of no negligence.

*Hatfield v. Glasgow* (4) was cited by Mr. Mukerji as an instance of circumstances which do not attract the maxim *res ipsa loquitur*. This was a case of a collision between ships at sea, and I do not see how it can have any application.

Two Indian cases were cited on behalf of the defendant which arose out of damage caused by water escaping from its confines on the defendants' lands and causing damage to the property of the

(1) (1868) 3 H. L. 330.

(2) [1945] 1 All. E. R. 106.

(3) [1914] 3 K. B. 772.

(4) (1915) 84 L. J. (H. L.) 161.

plaintiffs. In the *Madras Railway Company v. The Zamindar of Carvatsnagarum* (1), a zamindar was held by the Privy Council not to be liable for damage caused by the overflow, due to an extraordinary flood, of water from tanks which it was his duty to maintain on his zamindari as part of a system of irrigation recognised by law and custom as essential to the welfare of the people. Their Lordships distinguished *Rylands v. Fletcher* (2) on the ground that the zamindar was charged under the Indian law with the duty of maintaining the tanks in question for the benefit of large numbers of people, and that his rights and liabilities were analogous to those of persons or corporations upon whom statutory powers had been conferred and statutory duties imposed. The Right Hon'ble Sir Robert Collier, delivering the judgment of the Judicial Committee, quoted the following words of Chief Justice Cockburn in *Vaughan v. Taff Vale Railway Company* (3), "Where the Legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the Legislature carries with it this consequence, that if damages result from the use of such a thing independently of negligence, the person using it is not responsible." Regarding *Rylands v. Fletcher* (2) their Lordships said (page 385):—"In that case the defendants for their own purposes brought upon their land and there accumulated a large quantity of water by what is termed by Lord Cairns 'a non-natural use' of their land. They were under no obligation, public or private, to make or maintain the reservoir; no rights in it had been acquired by other persons; and they could have removed it if they had thought fit." In my opinion these observations apply with equal force to the displaying by the defendant in the present case, of the advertising banner on the roof of his Cinema house.

The other Indian case upon which Mr. Mukerji relied, *Ram Lal Singh v. Lill Dhary Mukton* (4), was one in which the principle laid down by the Privy Council in the *Madras Railway Company's* case (1) was applied. In this case Ainslie, J. observed as follows:—"Now, the law as laid down in English text-books is, no doubt, a very useful guide; but it must not be taken to override

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(1) (1874) L. R. 1 L. A. 354; 14 B. L. R. 209.

(2) (1868) 3 H. L. 330.

(3) (1860) 5 H. &amp; N. 679.

(4) (1877) L. L. R. 3 Calc. 776.

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the customs of this country, customs arising from the extreme necessity of preserving water and thereby preserving the means of cultivating large tracts of land which would otherwise be waste." This case also involved the defence of act of God or *vis major* with which I shall presently deal.

A careful consideration of the cases discussed above has satisfied me that the maxim *res ipsa loquitur* applies to the facts relative to the occurrence in the present case. The plaintiff's version of those facts, supported as it is by the evidence of Raj Deo Ojha, Ram Laish Singh, and Savajit Singh who are independent and, in my opinion, truthful witnesses must be accepted as a correct statement of the circumstances under which the plaintiff received his injury, and the suggestion that he was struck by an article or articles described as 'shades' which fell from the roof of a neighbouring building at the same time as did the banner, must be dismissed as a theory which has no foundation and is opposed to the evidence. This conclusion casts the burden of proving exercise of due care on the defendant. Evidence to rebut the presumption of negligence has been given on his behalf, but I am not impressed by it. It is however unnecessary at the moment to discuss its inherent infirmities, or to go to the length of saying, at this stage, that what was stated by the defendant's manager, Basu Mullick, regarding the precautions which he took to see that the banner was properly fastened to the frame of the sky-sign was materially untrue. I shall refer to this aspect of the matter later. This, in my judgment, is a case in which the indisputable facts, attract the rule in *Rylands v. Fletcher* (1), and that being so, the defendant is called upon to answer his liability for the injury caused to the plaintiff by the falling banner not by merely showing that due care was exercised, but in one of the modes which alone constitute a defence to liability in cases of the *Rylands v. Fletcher* (1) type. One of these is the defence of act of God or *vis major*, and the defendant has in fact raised it by contending that the fall of the banner was caused by a storm of unusual severity. The evidence adduced in support of this contention will have to be examined for the purpose of seeing whether it proves that such a storm took place as would amount to act of God or *vis major* as that concept has been understood in the Law of Torts. Therefore before approaching the evidence regarding the weather which prevailed at the time when the banner fell, it will be necessary first to consider the cases in which act of God or *vis major* has been discussed.

(1) (1868) 3 H. L. 330.

Professor Winfield, following Pollock, has defined act of God as "an operation of natural forces so unexpected that no human foresight or skill could reasonably be expected to anticipate it."

In *Greenock Corporation v. Caledonian Railway* (1), Lord Parker said: "*Rylands v. Fletcher* (2) saved the question whether the act of God might not have afforded a defence, and this question was answered in the affirmative in *Nichols v. Marsland* (3), in which the act of God had been established by the finding of the jury, though I have some doubt whether that finding was correct."

Mr. Mukerji has relied strongly upon *Nichols v. Marsland* (3) in support of his contention that the state of the weather at the time when the banner fell was not stormy that the defendant may plead act of God as an answer to the plaintiff's claim. The facts of that case were as follows: There were some artificial lakes on the defendant's land which had been formed by damming up a stream. Owing to an extraordinary rainfall, greater and more violent than any the witnesses could remember, the stream and the lakes burst their banks and the water inundated the plaintiff's land and carried away some county bridges. The plaintiff, who sued on behalf of the county, contended that the defendant was liable on the principle of *Rylands v. Fletcher* (2), but the Court of Exchequer Chamber decided that the defendant could not be held liable for an extraordinary act of nature which could not be reasonably anticipated.

With reference to the view taken of act of God in *Nichols v. Marsland* (3), Fry, J. said, in *Nitro-Phosphate Company v. London & St. Katherine Dock Company* (4): "In order that the phenomenon should fall within that rule, it is not in my opinion necessary that it should be unique, that it should happen for the first time; it is enough that it is extraordinary, and such as could not reasonably be anticipated. That appears to me to be the view which has been taken in all the cases, and notably by Lord Justice Mellish in the recent case of *Nichols v. Marsland* (3)." This statement was assented to by Lord Coleridge, C. J., in *Dixon v. The Metropolitan Board of Works* (5).

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(1) [1917] A. C. 556 (581).

(2) (1868) 3 H. L. 330.

(3) (1875-1876) L. R. 10 Ex. 255; 46 L. J. Ex. 174.

(4) (1878) 9 Ch. D. 503 (516).

(5) (1831) 7 Q. B. D. 418 (421, 422.)

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*Nichols v. Marsland* (1) was distinguished in *Greenock Corporation v. Caledonian Railway* (2). Professor Winfield has dealt with this matter in a short compass at page 53 of his Text-Book of the Law of Tort (and Edition):—"The principle underlying *Nichols v. Marsland* (1) is unquestioned, but the decision itself has aroused adverse criticism in later cases, notably in *Greenock Corporation v. Caledonian Railway* (2). The corporation, in laying out a park, constructed a concrete paddling pool for children in the bed of a stream and thereby altered its course and obstructed its natural flow. Owing to rainfall of extraordinary violence, the stream overflowed at the pond and a great volume of water, which would have been safely carried off by the stream, in its natural course, poured down a street and flooded the property of the railway company. It was held by the House of Lords that this was not *damnum fatale* (the equivalent in Scot's law of the 'act of God') and that the Corporation was liable. Some of the noble and learned Lords cast doubt upon the finding of facts by the jury in *Nichols v. Marsland* (1)." In the *Greenock Corporation* case (2) Lord Finlay observed:—"It is true that the flood was of extraordinary violence, *but flood of extraordinary violence must be anticipated as likely to take place from time to time*:" and on this point Lord Dunedin said: "The appellants argue that.....if they can show that this rainfall was much in excess of what had been previously observed in Greenock that is enough. I do not think that you can rightly confine your view to Greenock alone. *No one can say that such rainfall was unprecedented in Scotland*; and I think the appellants were bound to consider that some day Greenock might be subjected to the same rainfall as other places in Scotland had been subjected to."

The italics are mine. They serve to remind one of the fact that, in the present case, the incident happened during the monsoon, a season in which stormy weather is not unusual and storms of considerable severity are by no means unprecedented. Whether the climatic disturbances of the 5th July 1943 amounted to a severe storm at all is a question of fact which I shall deal with later upon the evidence.

*The Great Western Railway of Canada v. Braid* and *The Great Western Railway of Canada v. Fawcett* (3), were two appeals from Canada which were heard together by the Privy Council. They

(1) (1875-1876) L. R. 10 Ex. 255; 45 L. J. Ex. 174.

(2) [1917] A. C. 556.

(3) (1863) 1 Moo. P. C. C. (N. S.) 101.

arose out of two suits for damages for deaths occasioned by a railway accident which was caused by the collapse of an embankment. The case was earlier than *Rylands v. Fletcher* (1) and it is interesting to note that two of the matters which it involved are the principle of the maxim *res ipsa loquitur*, and the defence taken on behalf of the railway company, that the collapse of the embankment was due to a storm of such an extraordinary nature that no experience could have anticipated its occurrence. Lord Chelmsford delivering the judgment of the Judicial Committee, said regarding the former matter (at page 116):—"There can be no doubt that when an injury is alleged to have arisen from the improper construction of a railway, the fact of its having given way will amount to *prima facie* evidence of its insufficiency, and this evidence may become conclusive from the absence of any proof on the part of the company to rebut it." Regarding the second matter, His Lordship said (at page 120):—"Their Lordships, without attempting to lay down any general rule upon the subject, which would probably be found to be impracticable, think it sufficient for the purposes of their judgment in these cases to say that the Railway Company ought to have constructed their works in such a manner as to be capable of resisting all the violence of weather which in the climate of Canada might be expected, though perhaps rarely, to occur." His Lordship referred to what the witnesses had said in describing the storm, and then went on to make the following comment (page 121):—"In the whole of this evidence there is nothing more proved than that the night was one of unusual severity, but there is no proof that nothing similar had been experienced before, nor is there anything to lead to a conclusion that it was at all improbable that such a storm might at any time occur." His Lordship after referring to the report of the Company's engineer, said (page 122):—"Whatever his meaning may be, it is evident that the embankment was in sufficiently provided with means of resisting the storm, which, though of unusual violence was not of such a character as might not reasonably have been anticipated, and which, therefore, ought to have been provided against by all reasonable and prudent precautions."

*The Great Western Railway of Canada's* case (2) as well as *Greenock Corporation v. Caledonian Railway Company* (3), were followed by the Privy Council in *City of Montreal v. Watt & Scott* (4),

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(2) (1863) 1 Moo. P. C. (N. S.) 101.

(3) [1917] A. C. 556.

(4) [1922] 1 A. C. 555.



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where it was laid down that it was the duty of a municipality in constructing sewers, to make them capable of coping with the amount of water which might be expected from time to time in the course of years.

In *Ram Lall Singh v. Lill Dhary Mukton* (1), Ainslie, J. followed *Nichols v. Marsland* (2), and said :—" This case seems to us to apply distinctly to the present. It appears from the judgment of the Judge, that the damage in the present instance was caused by an unusual inundation, which he describes as bringing down four times the ordinary quantity of water. It must be taken that the damage was caused by the act of God, and not by the act of the defendants, who are not shown to have failed in making provision for properly dealing with such quantities of water as might reasonably be expected to accumulate. "

The cases considered above bring us back to the definition of act of God or *vis major* contained in Professor Winfield's book, which, at the expense of repetition, I would quote again : " An operation of natural forces so unexpected that no human foresight or skill could reasonably be expected to anticipate it. " I shall now examine the evidence regarding the "storm" which is alleged by the defence to have taken place on the 5th July, 1943.

It was suggested in cross-examination to the plaintiff's witnesses Raj Deo Ojha, Ram Laish Singh and Savajit Singh, that there was a storm or strong wind at the time when the banner fell, but they all categorically denied it. It was similarly suggested to Mr. S. N. Gupta that the weather was stormy on the evening of the 5th July, but he maintained that though there was cloud and rain there was no storm. The witness Raj Deo Ojha conceded that when the banner fell there was a gust of wind, and the plaintiff admitted that this might have been the case.

The defendant's witness Basu Mullick, the manager of the Rupali Cinema, deposed on the other hand that on the 5th July the weather was cyclonic. The question is set at rest by the evidence of Bishnupada Shaha, who is employed as the Chief Observer in the Weather Office of the Meteorological Department at Alipore. This witness is a Master of Science of the Calcutta University and gave evidence as an expert. He impressed me as being disinterested and independent. From the records of his department he testified that on the afternoon and evening of the 5th July there was not a great deal of rain and that the velocity of

(1) (1877) I. L. R. 3 Calc. 776.

(2) (1875-6) 2 L. R. Ex. D. 1 ; L. R. 10 Ex. 255 ; 45 L. J. Ex. 174.

the wind was as follows:—From 5-30 P. M. to 7-14 P. M. it was moderate, i. e. from 8 to 10 miles per hour. From 7-14 P. M. to 8-40 P. M. it was rather high, the maximum gust being about 27 miles per hour at about 7-45 P. M. From 8-40 P. M. to 11-30 P. M. the wind was again moderate, i. e. from 8 to 10 miles per hour. The witness described the phenomena which occur in different states of wind velocity: At 22 to 27 miles per hour, large branches of trees are put in motion, whistling is heard in telegraph wires, and umbrellas are held with difficulty. At 28 to 33 miles per hour whole trees are in motion and inconvenience is felt in walking against the wind. At 34 to 40 miles per hour, twigs are broken off and walking is impeded. At 41 to 48 miles per hour slight structural damage occurs, and loosely fastened corrugated iron is removed from roofs. The witness further stated that wind velocities of from 31 to 48 miles per hour are sometimes experienced in Calcutta during nor-wester squalls, and that gusts of from 28 to 33 miles per hour are not uncommon in the monsoon season. This evidence puts an end to the plea of act of God, for, if it is accepted, as I think it must be, then it is idle to say that the force of the wind was so unexpected that no foresight could reasonably be expected to anticipate it.

Although this conclusion is sufficient to fasten liability on the defendant upon the principle of *Rylands v. Fletcher* (1), I would go further and hold that the presumption of want of due care on the part of the defendant or his servants, which the maxim of *res ipsa loquitur* raises against them has not been rebutted. In not taking precautions against winds which are not unusual during the monsoon months, the defendants were prima facie negligent, and the fact that the banner fell in a wind which was not above 27 miles per hour in velocity, goes a long way to discredit all the elaborate evidence of Basu Mullick and Amitava Roy regarding the tying of the banner to the framework of the sky-sign on the 11th June by three strands of new coir rope. I cannot believe this evidence, for, if it is true, the banner would not have fallen. As stated before, it was made fast in a position flat against the galvanised sheeting of the sky-sign structure. If the wind was from the west, that would have pressed the banner against the sky-sign frame, not torn it away from there. If the wind was from the east, the banner would have been in the lee of the sheeting, which would have kept the wind away from it. I find that there is some confusion in the transcript of the evidence of Bishnupada Shaha as to whether the wind that

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evening was from the south-west or south-east, but, for the reason just stated, I do not think that matters much. It certainly does not support the explanation advanced by Basu Mullick, that a strong wind either from the north or the south tore into the narrow space between the galvanised sheeting and the banner, and caused the ropes to part in spite of their having been securely tied. Port or starboard, windward or leeward, it makes no difference to Basu Mullick: And then the ropes at all the four corners parted at the same time. Had one gone, and the others held, the banner would not have fallen into the street, and the evidence given to show that every precaution was taken to see that the banner was securely fastened to the sky-sign frame might not have been so transparently untrue. I hold that the defendant is liable upon the principle in *Rylands v. Fletcher* (1), and I further find that there was negligence on the part of his servants for which he is responsible in law, inasmuch as proper care was not taken to secure the banner in such a way as to prevent it from being blown into the street during monsoon weather.

I come now to the question of damages. The plaintiff, who is 51 years of age, is employed as a clerk in the Department of the Viceregal Estates which is under the Public Works Department. His salary and allowances amount to Rs. 228 per month, and he is entitled to free quarters.

The plaintiff's evidence is that when the banner fell on him, it felled him to a sitting posture and stunned him. On regaining consciousness he discovered that he was bleeding profusely from the head. Two or three persons, who turned out to be armed police constables, and who were off duty at the time, came to his assistance and lifted the banner off his person. One of these men bandaged his head, and he was then taken by one of them in a rickshaw to the Shumbhunath Pundit Hospital. There he was again bandaged, admitted as an indoor patient, and put to bed. As the bleeding persisted, he was operated upon under a general anaesthetic that night. He remained in the Hospital for five days till the 10th June, when, at his own request, he was allowed to go home. Dr. A. M. Dutta, from this Hospital, attended him daily at his house for more than one month. He paid Dr. Dutt Rs. 240 for his services, and he had to spend Rs. 200 on medicines and special diet, and Rs. 10 for conveyance to and from the Hospital. He had to apply for one month's leave of absence from his post,

and was unable to return to it till after the 8th August 1943, on which date he was examined by Lt. Colonel Thakur who certified him as fit to resume his duties.

The plaintiff's evidence regarding the occurrence is supported by the witnesses, Raj Deo Ojha, Ram Laish Singh and Savajit Singh. His evidence regarding the subsequent facts finds corroboration in the testimony of the following witnesses. Mr. S. N. Gupta, the Supervisor of the Viceregal Estates, and the plaintiff's immediate official superior, Dr. S. K. Mitra, Resident Medical Officer of the Shumbhunath Pundit Hospital, Dr. A. M. Dutta, House Surgeon at that Hospital, and Dr. N. N. Chanda, another House Surgeon at the same Hospital.

The cut on the plaintiff's head is described by the doctors as three and a half inches long, one inch wide, and bone deep. There is no doubt that the wound bled for several hours before the hemorrhage was stopped by the tying of certain blood vessels. Apart from pain in the head, the plaintiff said he suffered for a few days from severe pain in the shoulder. His evidence further is that before the accident he had enjoyed perfect health, and had taken no leave for about 8 years, that since the mishap his health has deteriorated to such an extent that he suffers from nervousness when he goes out, he cannot concentrate on his work as before, he is not capable of protracted effort, his memory has been affected and his eyesight impaired. He stated that, in the usual course, he had a chance of being selected to fill a higher official appointment upon a salary which might have reached Rs. 400 per month, but as his efficiency has been reduced, his superior officer, Mr. Gupta, was unable to recommend him for such a selection. This statement is fully endorsed by Mr. Gupta, who also deposed that the plaintiff was a hard-working and experienced man who enjoyed perfect health before the accident, but that since then the state of his health has been such as to have caused a considerable falling off in his efficiency.

Dr. A. M. Dutta, who treated the patient while he was in hospital, and later attended upon him daily at his house, has testified that the condition of the wound which was healing nicely for the first few days, suddenly deteriorated. Upon examination the witness found that the plaintiff had both diabetes and high blood pressure. In the witness' opinion the diabetes might possibly have been the result of a disturbance of the automatic nervous system brought on by a shock to the brain caused by the head injury. I might here say that on this point the witness has

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been contradicted by Dr. Tren, who was examined as a medical expert on behalf of the defence, but who had never examined the plaintiff. I do not take Dr. Dutta's opinion as to the cause of the diabetes from which the plaintiff was suffering into consideration in assessing damages, and in estimating that I shall leave diabetes out of account altogether. But Dr. Dutta asserted that the plaintiff's injury was, by reason of its location and extent, a serious injury. The effect of Dr. Dutta's evidence was that, in his opinion, the state of health to which this injury had brought the plaintiff was symptomatic of a shortened expectation of life and a reduced capacity for work. I have no reason whatever for not accepting the testimony of the witnesses referred to above in all the particulars just indicated, save and except the statement of Dr. Dutta that the diabetes, and perhaps the blood pressure, from which he found the plaintiff to be suffering, may possibly have been due to his injury. This is a pure matter of speculative opinion and it would be safer not to place any reliance upon it. But as it is only that, it reflects in no way upon the rest of Dr. Dutta's evidence, which finds ample support in the evidence both of the plaintiff and of his immediate official superior, Mr. S. N. Gupta.

A number of cases have been cited by both sides upon the question of assessment of damages, but not all of these have application here. I shall refer briefly to certain decisions which, in my opinion, afford some guidance in the special facts of the present case.

*Phillips v. L. & S. W. Ry* (1) was a case which arose out of a railway accident in which the plaintiff, an eminent medical practitioner, sustained injuries, for which he claimed damages against the railway company. The jury awarded the plaintiff £7,000. The Queen's Bench Division directed a new trial on the ground of inadequacy of damages, (2). An appeal from that order was dismissed by the Court of Appeal (1). The second trial took place before Lord Coleridge C. J., and the jury awarded the plaintiff £16,000 as damages. The defendant again moved for a retrial, but a rule was refused, and this decision was upheld by the Court of Appeal (3). Bramwell L. J. referred (p. 287) to the summing up of Lord Coleridge at the second trial, and said:—"I think that the direction of Lord Coleridge was such as is usually given and was right. I have tried as a Judge more than a hundred actions of this kind, and the direction which I,

(1) (1879) 5 Q. B. D. 78; 49 L. J. Q. B. 233.

(2) (1879) 4 Q. B. D. 406.

(3) (1879) 5 C. P. D. 280.

in common with other judges have been accustomed to give the jury has been to the following effect: 'you must give the plaintiff a compensation for his pecuniary loss, you must give him compensation for his pain and bodily suffering, of course it is almost impossible for you to give to an injured man what can be strictly called a compensation; but you must take a reasonable view of the case, and must consider under all the circumstances what is a fair amount to be awarded to him.' I have never known a direction in that form to be questioned."

In *Owen v. Sykes* (1) the plaintiff, a medical practitioner, who was thirty nine years of age and an athlete, sustained through the negligence of the defendant's servants, injuries having permanent results which necessitated his employing an assistant to help him to carry on his practice for the rest of his life, and also prevented him from following his athletic career. The action was tried without a jury, and the Judge awarded £10,000 as damages. The Court of Appeal held, that although if they had tried the case in the first instance, they would probably have awarded a smaller sum as damages, yet they would not reduce the amount awarded by the trial Judge, as they were not satisfied that the Judge acted upon a wrong principle of law, or took an erroneous view of the evidence as to the damage suffered by the plaintiff, or made some mistake in giving weight to evidence that ought not to have affected his mind, or in leaving out of consideration something that ought to have affected his mind, or that the amount was so high or so low as to make it an erroneous estimate of the damage to which the plaintiff was entitled.

This decision adopted the criterion laid down by Greer, L. J. in *Flint v. Lovell* (2), which case is an authority for the proposition that in assessing damages, a Judge is entitled to take into consideration, as one of the elements of damage, the fact that the plaintiff's normal expectation of life has been materially shortened. That principle was approved by the House of Lords in *Rose v. Ford* (3), where Lord Wright said (page 847):—"I think he has a legal interest entitling him to complain if the integrity of his life is impaired by tortious acts not only in regard to pain, suffering and disability, but in regard to the continuance of life for its normal expectancy. A man has a legal right that his life should not be shortened by the tortious act of another. His normal expectancy of

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(1) [1936] 1 K. B. 192.

(2) [1935] 1 K. B. 354 (360).

(3) [1937] A. C. 826.

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life is a thing of temporal value, so that its impairment is something for which damages should be given."

In *the Aisharai Mendi* (1), the principle enunciated in *Rose v. Ford* (2) regarding assessment of damages for loss of expectation of life was applied.

In *Roach v. Yates* (3), a bricklayer, aged thirty two, sustained such serious injury to the brain as to render him permanently unfit for work, and so incapable of looking after himself that his wife and sister-in-law, whose total wages amounted to £ 3 a week, had to give up their employments to attend on him day and night, and his expectation of life was shortened from thirty to sixteen years. At the time of the accident he was earning an average wage of £ 3-10 a week. Damages to the extent of £ 6,542 including special damage of £ 542 were awarded. In this case it was held by the Court of Appeal that in assessing damages, it was proper to take into account the following amongst other elements :—In respect of the man's prospective loss of wages, the sum which he would have earned during what, but for the accident, would have been his normal life according to actuarial tables ; in respect of his physical and mental pain and suffering, and the shortening of his life, a sum in estimating which it should be kept in view that no amount of money could fully compensate him for his injuries, and that the most that could be done was to award him such compensation as was reasonable in all the circumstances of the case.

In *Johnstons v. G. W. Railway* (4), the plaintiff, a man of twenty eight years of age, had qualified as marine engineer and had a good prospect of obtaining an appointment as a superintending marine engineer. Owing to injuries received in a railway accident he was rendered incapable of filling such a position, and the jury awarded him £ 3,000 as damages. In declining to interfere with the verdict, the Court of Appeal held that the jury were entitled to take into consideration the possibility that the plaintiff would never be able to accept the position of a superintending marine engineer. Vaughan Williams, L. J. approved of the direction given to the jury by the trial Judge, which was based on *Rowley v. London & N. W. Railway* (5). " There are the accidents of life and other elements which have to be taken into consideration which ought to prevent you giving him such a sum as would be simply an

(1) (1938) 3 All. E. R. 483.

(2) [1937] A. C. 826.

(3) [1938] 1 K. B. 256.

(4) [1904] 2 K. B. 250.

(5) (1873) L. R. 8 Ex. 221.

investment for him, and enable him to do nothing. Still he is entitled to a fair sum, considering the position for which he was fitted, and the position in which he is now."

*Benham v. Gambling* (1), was a case in which a father brought an action claiming damages in respect of the death of his child aged 2½ years, who was so injured in a motor accident that he died the same day. Lord Simon, L. C., delivering the judgment of the House of Lords, observed with reference to the shortening of life as a consideration in assessing damages (at page 166):—"It is necessary for the Court to be satisfied that the circumstances of the individual were calculated to lead, on a balance, to a positive measure of happiness, of which the victim has been deprived by the defendant's negligence."

These cases make it apparent that considerations which may be permitted, in circumstances where they arise, to influence an assessment of damages include: (1) pain and suffering, (2) loss of earnings or loss of a prospect of lucrative employment, and (3) a shortened expectation of life provided that life held a positive measure of happiness.

Upon the evidence to which I have referred, and which I accept as representing a strictly truthful account of the condition to which the plaintiff has been reduced by the accident, I am bound to hold that he has suffered, firstly, bodily pain, and the physical discomfort and mental anguish of greatly impaired general health and disability; secondly, loss of the prospect of enjoying for 4 or 5 years a more lucrative position than that which he now holds; and, thirdly, a shortened expectation of life that held promise of the happiness which flows from labour efficiently and easily performed.

I do not think Rs. 5,000 would be either too large or too small a figure in which to express an estimate of the injury which the plaintiff has suffered.

As regards special damages, I accept the plaintiff's evidence that he had to spend Rs. 450 in connection with medical treatment, and I think it is a moderate estimate.

In the result, my findings upon the issues raised at the trial are as follows:—

On Issue No. 1.—This Court has jurisdiction to try this suit.

As stated before jurisdiction was conceded, but I should also say that the defendant's admission that he used to receive his

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business letters, by appointment with the postman at 5, Dharmatala Street places the matter beyond doubt.

On Issue No. 2—The plaintiff was injured on the 5th July 1943, as alleged in the plaint.

On Issue No. 3—The plaintiff sustained a cut on the head  $3\frac{1}{2}$  inches long, 1 inch wide, and bone deep which has brought about a general deterioration of his health, and a reduction of his power to concentrate on his work.

On Issue No. 4—The occurrence was not due to a severe storm or to any unavoidable or unexpected cause.

On Issue No. 5—It was due to the negligence of the defendant's servants.

On Issue No. 6—The plaintiff is entitled to a decree for Rs. 5,450.

I decree the suit for that amount with costs.

Before I leave this case there is a word I wish to say in the public interest.

The plaintiff, an inoffensive passerby in a public thoroughfare, was severely injured by an advertising device consisting of a picture on cloth in a wooden frame 12 ft. by  $3\frac{1}{2}$  ft. which fell from its attachment on a sky sign framework erected on the roof of the Rupali Cinema House. I have found that the mishap was due to the negligence of the person or persons who had caused this contrivance to be fastened to the frame of the sky-sign by means of ropes, and I have awarded the injured man a sum of Rs. 5,450 as damages both general and special.

If the present lot of the pedestrian in Calcutta is to be aggravated by danger from the falling of articles attached to licensed sky-signs in such a way that a monsoon gust will blow them into the streets, then a new terror will be added to life. This is a matter which the Calcutta Municipality can control.

It is not helpful to say, as the Chief Law Officer of the Corporation, who was called as a witness by the Court, has said, that because a sky-sign is, according to its definition in the Act, not a sky-sign till an advertisement is displayed from it, the licensee has the right to tie things to the framework, and that he commits no violation of the conditions of his license unless he has neglected to take proper precautions. The fact remains that the Municipality can, if it will, enforce frequent and regular supervision of licensed sky signs so as to prevent occurrences like the one which has given rise to this action for damages.

An unsatisfactory state of things is disclosed by the evidence of the Municipality's District Building Surveyor, who deposed as follows:—

Q. 73. "Is it not the duty of the Corporation to inspect from time to time to see whether the proprietor of the cinema is making proper use of the sky sign or not?"

Ans. "The difficulty is this, there is only one building inspector for 2/3 wards and when something wrong happens to it they don't get time to inspect it"

Q. 74. "Did the Corporation take any steps against the owner of the Rupali?"

Ans. "I don't find anything in the record."

Winfield cites the instance of the eighteen Jews upon whom the Tower of Siloam fell, narrated in the New Testament, as an illustration of a tendency to regard the catastrophe as a punishment for the sins of the injured person. I am sure the citizens of Calcutta would not wish to see sky-sign embellishments classified as instruments of destiny in the same category as the biblical tower. I hope the matter will receive the early consideration of the Municipal authorities.

There is one other matter. It is pleasant to be able to bring to the notice of the police authorities an instance of laudable conduct by constables. The men of the armed police, Raj Deo Ojha, Ram Laish Singh, and Savajit Singh, especially the first named, (albeit that they were all off duty at the time), displayed commendable initiative as well as kindness in rendering first aid to the injured man, and in removing him with promptitude to the hospital. Conduct like this deserves praise and encouragement, and one hopes it may be emulated by others in the rank and file of the Indian Constabulary.

A. T. M.

*Suit decreed*

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Before Mr. Justice N. A. Khundkar.

BIRESWAR GHOSE

v.

SRISH CHANDAR GHOSE.\*

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*Substitution—Death of plaintiff—Right of action, survival of—Letters of administration, if necessary—Indian Succession Act (XXXIX of 1925), section 306—Plaint, amendment of.*

In case of death of plaintiff, the right to sue survives to persons other than executor or administrator.

Under general principles, the causes of action survive a deceased plaintiff.

The rule laid down in section 306 of the Indian Succession Act, 1925 formulates certain powers of executors and administrators, does not occupy the entire field of legal representation in matters of litigation.

Provided the parties concerned are exempt under section 212 (2) of the Indian Succession Act, 1925 from applying for letters of administration, the causes of action directly affecting property, not only are the heirs of a deceased plaintiff or defendant who died intestate the proper person to be substituted in the deceased's place, but the law requires that all ascertainable heirs should be substituted :

*Fajor Bannu and others v Rohim Bux Bhuiya* (1) and other cases referred to.

A instituted a suit against his youngest son, D, who is the opposite party in the application for substitution, for a declaration that certain conveyances which he had executed in D's favour, were inoperative and void, and for recovery of possession of property which was the subject-matter of those conveyances and also to set aside a money decree which the defendant D obtained against him. The plaintiff died intestate and his heirs apply to be substituted in his place as plaintiffs in the suit.

D, the defendant, urged that as A died intestate and no letters of administration have been granted, section 306 of the Indian Succession Act, 1925, was a bar to the application :

*Held*, that the right to continue the action survived to heirs and section 306 of the Indian Succession Act was no bar.

*D. K. Cassim & Sons v. Sara Bibi* (2) not followed.

*Krishna Behari Sen v. The Corporation of Calcutta* (3) and *Official Liquidators Mizfussil Bank v. Jugul Kishore* (4) explained.

It was also contended that the special facts in the present case make it desirable that one or more of the heirs of A, the plaintiff, who seek to prosecute the suit, should take out letters of administration, as one of the reliefs claimed was recovery of possession of property by some heirs against

\* Original Civil Suit No. 262 of 1944.

(1) (1928) 32 C. W. N. 1020.

(2) (1935) I. L. R. 13 Rang. 385.

(3) (1904) I. L. R. 31 Calo. 993.

(4) (1939) I. L. R. All. 6.

a co-heir, the claim being based on the allegation that all the heirs had inherited a share in it :

*Held*, that such objection was met by amending the plaint so as to make the prayer for recovery of possession a prayer for joint possession with D the defendant.

Application by the Heirs of a deceased Plaintiff to be substituted in his place.

The following judgment was delivered by

**Khundkar, J. :—**This is an application by the heirs of a deceased plaintiff to be substituted in his place as plaintiffs in the suit. The circumstances which have given rise to this application are as follows :—

One Bireswar Ghose instituted a suit against his youngest son, Srish Ghose, who is the respondent opposite party in the present application, for a declaration that certain conveyances which he had executed in Srish's favour were inoperative and void, and for recovery of possession of property which was the subject matter of those conveyances. In the same suit, the plaintiff sought to have set aside a money decree which the defendant had obtained against him.

The plaintiff died intestate, and the applicants seek to continue the suit, hence the present application. The applicants for substitution are all the heirs of Bireswar other than Srish. The application is opposed, and it is urged that as Bireswar died intestate, and no letters of administration have been granted, section 306 of the Indian Succession Act is a bar to the application which can be maintained only by an executor or administrator. Section 306 is in these terms :—"All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators ; except causes of action for defamation, assault, as defined in the Indian Penal Code ; or for personal injuries not causing the death of the party ; and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory."

On behalf of the applicants it is contended that as the deceased was a Hindu, section 212 (2) of the Succession Act renders it unnecessary for letters of administration to his estate to be taken out. It is further contended that under Order 22 Rule 3 of the Code of Civil Procedure the Court "shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit." "Legal representative" is defined in the

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Code itself, section 2 (11) of which says that it "means a person who in law represents the estate of a deceased person....." It is urged that Bireswar's heirs represent his estate.

There is, on the face of these contentions, the appearance of a conflict between different provisions of the law, and the matter calls for examination.

On behalf of the respondent, reliance has been placed on three cases :—*D. K. Cassim & Sons v. Sara Bibi* (1); *Krishna Behari Sen v. The Corporation of Calcutta* (2) and *Official Liquidators Mofassil Bank v. Jugul Kishore* (3). The last mentioned two cases may be dismissed at once. In *Official Liquidators Mofassil Bank v. Jugul Kishore* (3), the observations in the judgment which were relied upon in support of the present argument for the respondent are pure obiter, the case being disposed of on an entirely different ground, which was that the right to bring certain proceedings under the Indian Companies Act against a director would not continue after his death. In *Krishna Behari Sen v. The Corporation of Calcutta* (2) the heirs, already substituted in the place of a deceased plaintiff, were willing to take out letters of administration, and the point that they were under no obligation to do so, was not raised or considered. There remains the case of *D. K. Cassim & Sons v. Sara Bibi* (1), in which the plaintiff sued for damages for loss of credit and reputation caused by certain unlawful acts of the defendants. The defendant died, and it was held that, under section 305 of the Indian Succession Act, there was a right to continue the action against the executors or administrators of the deceased, and not against his heirs as such. The argument in this case centred round the construction of section 306 of the Indian Succession Act, and no reference was made to the provisions of the Civil Procedure Code in the judgment.

Now, it cannot but be observed that section 306 occurs in a chapter of the Succession Act which deals with, and is indeed confined to, the powers of executors and administrators. Section 305, which is the first section of that chapter, declares that, in respect of causes of action which survive the deceased, the executor or administrator has the same power to sue. The section does not say that other persons would not have an equal power. Section 306 then goes on to indicate what are the causes of action

(1) (1935) I. L. R. 13 Rang. 385 (405).

(2) (1904) I. L. R. 31 Calc. 993.

(3) (1939) I. L. R. All. 6.

"existing in favour of or against a person at the time of his decease" which do in fact survive to an executor or administrator. Nowhere is it indicated in the statute that, when a cause of action survives, it survives only to the executor or administrator of a deceased plaintiff or defendant and never to the heirs.

The real effect of these sections is that, whereas section 305 puts the executor or administrator in the same position as the deceased would have been in with regard to any causes of action which survive the deceased, section 306 makes clear what those causes of action are. There can be little doubt that, read together, the two sections leave room for the survival to persons other than the executor or administrator of actions affecting property.

Lord Esher M. R., in applying the general rule which is expressed in the maxim *actio personalis moritur cum persona*, laid down the test of what is *actio personalis* in *Finlay v. Chirney & Another* (1). That was an action for damages for breach of promise of marriage, brought against the executors of a deceased, in which the plaintiff was non-suited. Lord Esher said (pp. 498/499):—"Of course it is said, and said justly, that the damages recovered in the action affect the property of the respective parties; but that is not the proper test to apply; the true test is whether the cause of action itself is one which affects property." Section 306 of the Indian Succession Act expresses a qualification of the rule *actio personalis moritur cum persona* to the extent that it indicates that, amongst causes of action which survive, are included some actions of a personal nature, that is to say, personal actions other than those expressly excluded by the section itself.

Page C. J. made it clear that the case of *D. K. Cassim & Sons v. Sara Bibi* (2) was a personal action (p-392): "It is sufficient to point out that on the 10th June, 1925, a firm of D. K. Cassim & Sons, the present appellants, filed a suit against V. M. Abdul Rahman and S. P. Mani Iyer to recover damages for loss of credit and reputation caused by certain wrongful acts of the defendants." This case is therefore not an authority for the proposition that a cause of action which, in the words of Lord Esher, itself affects property, survive only to an executor or administrator and never to the heirs of a deceased plaintiff or defendant.

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(1) (1887) L. R. 20 Q. B. D. 494.

(2) (1935) I. L. R. 13 Rang. 385.

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There is a fallacy in the argument advanced on behalf of the respondent in the present case, and it lies in assuming that causes of action do not survive a deceased plaintiff or defendant under general principles, but only by reason of section 306 of the Succession Act and that therefore the conditions of survival must be in every case as laid down in this section and nowhere else. As indicated before, section 306 is part of a fasciculus of sections dealing with the powers of executors and administrators, and it is to be construed within the limits of that context. A rule which formulates certain powers of executors and administrators does not occupy the entire field of legal representation in matters of litigation.

It is plain that to extend section 306 of the Succession Act to all causes of action, including those which themselves affect property would be to stultify in large measure the provisions of section 212 (2), which exempt a Hindu, Mahomedan, Buddhist, Sikh, Jaina or an Indian Christian from applying for letters of administration in cases of intestacy. Moreover, such a construction of section 306 would raise a direct conflict with procedural provisions. These are contained in Order 22, rule 3 (1), which is in the following terms:—"Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court on an application made in that behalf shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit." The term "legal representative" is defined in the Code itself, and is wider than the term "executor" or "administrator", for section 2 (11) states it to denote a person who in law represents the estate of a deceased person. This definition is wide enough to include the heirs of a deceased plaintiff or defendant. Indeed, even before the definition was incorporated in the Code, it was held that the term "legal representative" included heirs (See *Dinamoni Chaudhurani v. Elahadur Khan* (1)).

The causes of action in the present case themselves directly affect property, for it is the right to certain property that is disputed in the suit, and declarations are asked for which will deny to the defendant his rights to it. In such cases, provided the parties concerned are exempt under section 212 (2) of the Succession Act from applying for letters of administration, not only are the heirs of a deceased plaintiff or defendant who died intestate

(1) (1904) 8 C. W. N. 843 (856).

the proper persons to be substituted in the deceased's place, but the law requires that all ascertainable heirs should be so substituted. In this connection the following cases may be seen:—*Fajor Bann & others v. Rahim Bux Bhuiya* (1); *Mayorjan Bibi & others v. Abdul Shuk & others* (2); *Ramesh Chandra Masumdar & others v. Dudmehar Bibi* (3); *Hafizul Hoque & others v. Altap Hossain Molla* (4).

In the present case it has been also contended that the special facts make it desirable that one or more of the heirs of Bireswar who seek to prosecute the suit should take out letters of administration, because one of the reliefs claimed is recovery of the possession of property by some heirs against a co-heir, the claim being based on the allegation that all the heirs have inherited a share in it. It is contended that, in these circumstances, the proper party to ask for possession would be an administrator and not some of the heirs. The argument has an appearance of plausibility but is, in my judgment, without substance. This particular objection could be met by amending the plaint so as to make the prayer for recovery of possession a prayer for joint possession along with the defendant. In my opinion, in the circumstances of this case and in view of the well-settled practice of this Court, the prayer for substitution ought not to have been opposed. The application is accordingly allowed, with costs.

A. T. M.

*Application granted.*

- (1) (1928) 32 C. W. N. 1020.
- (2) (1932) 37 C. W. N. 138.
- (3) (1936) 40 C. W. N. 1019.
- (4) (1939) 43 C. W. N. 1088.

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Before Mr. Justice S. R. Das.

MACKERTICH JOHN

v.

H. C. GUPTA, THE ADDITIONAL LAND ACQUISITION  
COLLECTOR OF CALCUTTA.\*

*Defence of India Act, section 2 (4)—Defence of India Rules 75A (1), (2), (5)—Order requisitioning remaining portion of a previously requisitioned hotel—Application for cancellation of order and writ of certiorari, if maintainable—Additional Land Acquisition Collector acting under Rule 75A, if a Court—Opinion of Land Acquisition Collector, if may be questioned in Court—Mandamus, if lies—Hotel, if an undertaking—Good will, if property under Government of India Act, 1935 section 299 (1).*

Under Rule 75A of the Defence of India Rules, the obligation to form an opinion regarding certain specified matters is in the nature of a condition or qualification or limitation annexed to the power of making the specified orders and circumscribes the scope and limit of that power. It is an integral part of the power itself. So, the delegation of the power carries with it its own limitation as part of itself and the delegatee must perform the one composite act, namely, the formation of the opinion and the making of the order, which is a valid exercise of the power.

No *certiorari* would lie, because the Additional Land Acquisition Collector, in acting under Rule 75A of the Defence of India Rules was not a Court.

The impugned order being a ministerial or executive act, *mandamus* does lie.

Where such power as is mentioned in Rule 75A is given to any particular authority and the exercise of the power is only dependent on the opinion of that authority the formation of the opinion of that authority is clearly a matter for executive direction and cannot be questioned in a Court of law. The Court cannot investigate into the grounds or the sufficiency or otherwise of the materials or evidence on which that opinion is formed and substitute its own opinion for that of the authority concerned.

*Liversidge v. Sir John Anderson* (1) referred to

If such power is exercised in bad faith or for a collateral purpose, it is an abuse of the power and not in reality an exercise of the power and the Court can interfere with such colourable exercise of power.

*In re : Banwarilal Ray* (2) referred to

An hotel is a business and consequently an "undertaking" in ordinary as well as in legal parlance.

\* In the matter of an order dated the 29th November, 1944, passed by the Land Acquisition Collector, Calcutta, in Case No. R574 of 1944.

(1) (1942) L. R. A. C. 206.

(2) (1944) 48 C. W. N. 766.

Some attribute of locality is common to all cases of goodwill. Goodwill emanates from a particular centre or source. It has a local habitation. It draws custom home to the source from which it emanates. These considerations apply to an hotel, particularly a residential hotel :

*Case-law reviewed.*

The impugned order, therefore, under the guise of requisitioning the buildings, also requisitions the business undertaking of the petitioner, for the goodwill of his business which is property and is attached to the buildings must necessarily go along with them. This is *ultra vires* Rule 75A of the Defence of India Rules and amounts to depriving the petitioner of his property otherwise than by authority of law and is opposed to section 299 (1) of the Government of India Act, 1935.

Application for a cancellation of an order of the Additional Land Acquisition Collector under the Defence of India Rules, for the issue of a writ of *certiorari* on him and for *interim* injunction for restraining him from enforcing the order.

*Messrs. N. C. Chatterjee and D. R. Das* for the Petitioner.

*Messrs. S. M. Bose, (Advocate-General), Mr. J. N. Mazumdar (Standing Counsel)* and *Mr. Hamidar Rahman* for the Respondent.

The judgment of the Court was as follows :—

**Das, J.** :—This is a Rule calling upon the respondent, who was and is the Additional Land Acquisition Collector of Calcutta, to show cause why he, his servants and agents should not forbear from enforcing the order made by him on November 29th, 1944, in Case No. R. 574 of 1944 and why the said order should not be cancelled and why a writ of *certiorari* should not be issued against him, calling upon him to produce before this Court the records and proceedings relating to the requisition of Continental Hotel, situated at No. 12, Chowringee Road. On December 5th, when this Rule was issued, an *interim* injunction was also granted restraining the respondents, his servants and agents from enforcing or taking any steps in pursuance and furtherance of the said order.

The material facts may be shortly stated as follows :—

For more than 30 years last, the petitioner has been carrying on business as a hotel-keeper under the name and style of Continental Hotel at No. 12, Chowringee Road within the jurisdiction of this Court. He pays Rs. 4,000 per month to the landlord as rent besides rates and taxes. This business is his sole business and means of livelihood and he lives on the premises with his family. The whole of the ground floor was until October, 1943,

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used as a restaurant and lounge where food and drinks used to be served to customers who were mainly military people. On the first floor during normal times there was accommodation for 29 persons in 6 double bed-rooms and 17 single bed-rooms. Ever since the commencement of the present War, large numbers of military personnel have come to Calcutta and in order to accommodate a larger number of them the petitioner installed 4 beds in each of the double bed rooms and 2 beds in each of the single bed-rooms. At present there is accommodation for 59 persons as boarders and lodgers in the hotel. There are only 7 permanent boarders each of whom has been there for a number of years and the rest of his customers mainly consist of military personnel. In his letter addressed to the Chairman, Requisitioning Board, a copy of which is annexed to the respondent's affidavit, it is stated that the petitioner employs over 300 persons for carrying on this business.

In October, 1943, the best part of the ground floor of the said hotel (10,000 sq. ft.) was requisitioned and the same is being run as a canteen for the entertainment of the armed forces. While the settlement of the petitioner's claim arising out of the aforesaid requisition was under consideration, a request was received from the military authorities on June 13th, 1944, for requisitioning the remaining portion of the Continental Hotel. Accordingly on June 15th, 1944, Mr. A. K. Ghose, L. C. S., Secretary, Requisitioning Board, gave notice of such request to the petitioner and called upon him to attend before the Board on June 20th, 1944, if he desired to make any representation. The petitioner wrote a letter to the Chairman, Requisitioning Board to which I have already referred. In this letter the petitioner set forth his objections to the proposed requisitioning of the entire Continental Hotel. On June 20th, 1944, the petitioner appeared before the Board and stated his objections. The petitioner heard nothing further in the matter for several months. In the meantime in the beginning of November, 1944, petitioner through his Solicitors Messrs. Fowler & Co., complained of the delay in the settlement of the petitioner's claim in respect of the requisition of the ground floor. On November 18th, 1944, the respondent asked the Solicitors to call at his office with the petitioner on November 24th, 1944. There was an interview between the respondent, the petitioner and his solicitor on the appointed day when an agreement in writing recording the terms of settlement of the petitioner's claim was signed. A letter was written by the respondent to the Accountant-General, Bengal to expedite payment. In fact on November 29th,

1944, a part payment was made to the petitioner. On the same date the impugned order for requisition of the remaining portion of the Continental Hotel was made by the respondent. This order was served on the petitioner on December 1st, 1944. The petitioner applied for and obtained the present Rule and *interim* injunction on December 5th, 1944. A gentleman of the name of Mr. C. D. Lettington and his wife called at the Continental Hotel on December 12th, 1944, for the purpose, as they informed the petitioner, of taking charge of this portion of the Continental Hotel and running the hotel for the authorities. In view of the *interim* injunction, however, they could not take over charge of the hotel.

In the petition used in support of the Rule and in the affidavit in reply of the petitioner it was charged that the impugned order had been made by the respondent *mala fide* and in pursuance of the threat said to have been held out by him at the interview held on November 29, 1944. At the hearing before me learned Counsel appearing in support of the Rule said, and in my opinion quite properly, that he would not pursue the charge by going into the disputed facts on which the charge was founded but would base his arguments on the terms of the Defence of India Act and the Rules made thereunder and on the meaning and effect of the impugned order and its validity in law. This relieves me of the necessity of examining and scrutinising the allegations of fact set forth in the petition and the affidavits filed herein.

Section 2 (1) of the Defence of India Act empowers the Central Government, by notification in the official Gazette, to make such rules as appear to it to be necessary or expedient for securing the defence of British India, the public safety, the maintenance of public order of the efficient prosecution of war, or for maintaining supplies and services essential to the life of the community. Sub-section (2) of the section lays down that without prejudice to the generality of the powers conferred by sub-section (1), the rules may provide for or may empower any authority to make orders providing for all or any of the 35 matters specified therein. Sub-section (3) of that section enacts, amongst other things, that the rules made under sub-section (1) may further confer power and impose duties upon the Central Government and any Provincial Governments or Officers and authorities of those Governments as respects any matter, prescribe the duties and powers of public servants and other persons as regards preventing the contravention of, or securing the observance of, the rules. Sub-

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section (4) authorises the Central Government to direct that any power or duty which by rule under sub-section (1) is conferred or imposed upon the Central Government shall in such circumstances and under such conditions, if any, as may be specified in the direction be exercised or discharged by any officer or authority subordinate to it or by any Provincial Government or by any officer or authority subordinate thereto or by any other authority. Sub-section (5) confers like power of delegation on the Provincial Government.

Under section 2 the Central Government made rules which are grouped under different heads in 18 parts. Rule 75A under which the order complained of was made was by notification, dated April 25th, 1943, inserted in part XII of the Rules which deals with "Essential supplies and works", clause (1) (omitting the proviso which is not material for our present purpose), (2) and (5) of this rule are in the following terms :—

(1) If in the opinion of the Central Government or the Provincial Government it is necessary or expedient so to do for securing the defence of British India, public safety, the maintenance of public order or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, that Government may by order in writing requisition any property, movable or immovable, and may make such further orders as appear to that Government to be necessary or expedient in connection with the requisitioning.

(2) Where the Central Government or the Provincial Government has requisitioned any property under sub-rule (1), that Government may use or deal with the property in such manner as may appear to it to be expedient, and may acquire it by serving on the owner thereof, or where the owner is not readily traceable or the ownership is in dispute, by publishing in the official gazette, a notice stating that the Central or Provincial Government, as the case may be, has decided to acquire it in pursuance of this rule.

(5) The Central Government or the Provincial Government may, with a view to requisitioning any property under sub-rule (1) or determining the compensation payable under sub-rule (4), by order—

(a) require any person to furnish to such authority as may be specified in the order such information in his possession relating to the property as may be so specified.

(b) direct that the owner, occupier, or person in possession of the property shall not without the permission of Government dispose of it (or where the property is a building, structurally alter it) (or where the property is movable, remove it from the premises in which it is kept) till the expiry of such period as may be specified in the order.

A copy of the Government of India notification dated the 27th February, 1943, over the signature of the Secretary to the Government of India and published in the Gazette of India was handed up to me by learned Counsel for the petitioner. There is no dispute as to the correctness of this copy. The notification runs as follows :—

*"Notification.*

No. 6—Dc (1) 43—In exercise of the powers conferred by sub-section (4) of section 2 of the Defence of India Act, 1939 (XXXV of 1939), the Central Government is pleased to direct that the powers conferred on it by rule 75A of the Defence of India Rules shall, in respect of any land and any building, part of a building or other premises together with any fixtures, fittings and furniture or other things therein, be exerciseable also by the Additional Land Acquisition Collector, Calcutta and 24-Parganas, within the town of Calcutta and its suburbs and in the District of the 24-Parganas."

In exercise of the powers thus delegated to him by or under the aforesaid notification the respondent, who is the Additional Land Acquisition Collector of Calcutta and 24-Parganas, made the impugned order on November 29th, 1944. The order is in the following terms :—

"Whereas in my opinion it is necessary and expedient, for securing the defence of British India, the efficient prosecution of the war, to requisition the buildings together with the compound thereof (and all fixtures, fittings, furnitures therein) described in the schedule below and to make the following orders in connection therewith :

Now, therefore, in exercise of the powers conferred by sub-rules (1) (2) and (5) of rule 75A of the Defence of India Rules, which have been directed under sub-section (4) of section 2 of the Defence of India Act, 1939, (XXXV of 1939), to be exercised by me, I make the following order namely :—

Mr. Mackertich John of the premises the owner of the said buildings

(a) shall place the said buildings, at the disposal and under

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the control of Land Acquisition Collector, Calcutta on and from 6th December, 1944, at 10-30 A.M. until six months after the termination of the present war unless relinquished earlier;

(b) shall furnish to the said Land Acquisition Collector, Calcutta such information in his-her-their possession relating to the said buildings, as the said Land Acquisition Collector, Calcutta may by an order in writing specify; and

(c) shall not, without the permission of the said Land Acquisition Collector, Calcutta in any way dispose of the said buildings as long as this order remains in force.

*The Schedule of Land and building.*

Remaining portion of the Continental Hotel, 12, Chowringhee Road which had not been previously requisitioned".

Mr. Chatterjee argued that Rule 75A provides for two things: (i) formation of opinion regarding certain specified matters by the Central Government or the Provincial Government and (ii) the making of the specified order or orders. No order could be made unless and until the Government concerned formed the necessary opinion. The formation of the opinion was mandatory. The government concerned must apply its mind to the necessity or expediency for securing certain specified objects. It must at the same time bear in mind the inhibition laid down in section 15 of the Act, namely the ordinary avocations of life and the enjoyment of property should be interfered with as little as might be consonant with the purpose of ensuring the public safety and interest and defence of British India. Bearing both things in mind, it should form its opinion and it is only when this opinion was formed in favour of making the order that the order should be made. This obligation of forming a requisite opinion, argued Mr. Chatterjee, was a duty cast upon the Government. Therefore Rule 75A imposed a duty and conferred a power. Section 2, sub-sections (4) and (5), empowered respectively the Central Government and the Provincial Government to delegate any power or duty, which was by any rule made under sub-section (1) conferred or imposed on it, to certain persons or authority. The Government concerned could delegate either the power or the duty or both. The notification in this case delegated only the power but not the duty. Therefore, contended Mr. Chatterjee, the duty or obligation to form the requisite opinion was retained by the Government. The Government had to discharge this duty first and then the respondent could in exercise of the power make the order. The recital in the order showed that the respondent had formed certain

opinion. The duty of forming the opinion not having been delegated to him, his opinion did not count and was quite irrelevant. The Government had to form the opinion and on the face of the order, that not having been done, the order was illegal and void, for the essential prerequisite to the making of a valid order was absent. The argument is attractive but is, in my judgment, unsound, on close examination. It is quite true that the formation of the opinion is absolutely necessary for the exercise of the power, but that does not mean that the one is totally independent of or unconnected with the other. I regard the obligation rather as a condition or qualification or limitation annexed to the power, than as, a fetter imposed on the power by itself, a separate or independent duty irrespective of the power. In my judgment this obligation has no separate or independent existence or use of its own. It is, as I have said, in the nature of a condition or qualification or limitation annexed to the power and circumscribes the scope and limit of the power. It is an integral part of the power itself. The formation of the opinion and the making of the order are but one composite act. The discharge of the obligation to form the requisite opinion and the making of the order together constitute the valid exercise of the power. This being so, the delegation of the power carries with it its own limitation as part of itself and the delegatee must perform the one composite act, namely, the formation of the opinion and the making of the order. I agreed with the learned Advocate-General that the expression "duty" in sub-sections (4) and (5) of section 2 refers to any substantive and independent duty that may, by the rules, be imposed on the Government concerned under sub-section (3) (iv) (a) and (b) of that section. There is no question that the power has been validly and properly delegated to the respondent. After such delegation the opinion must be that of the respondent and not of the Government and must therefore be formed by him. The order explicitly shows that the respondent formed his opinion. In my judgment therefore this part of Mr. Chatterjee's arguments must be rejected.

The learned Advocate-General contended that this application was not maintainable. No *certiorari* would lie, because the respondent in acting under Rule 75A was not a Court. This was not disputed by Mr. Chatterjee. The Advocate-General next contended that no *mandamus* could be granted. He referred me to the case of *Ex parte Cook, in re Dyson* (1). There the Commis-

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sioners of the Insolvent Debtors Court refused to recognise an assignment by the debtor. Then the assignee of the debtor obtained a decree in the Chancery Court upholding his assignment. The Lord Chancellor expressed the opinion that the applicant's title having been confirmed by the decree, the duty of the Commissioners of the Insolvent Debtors Court became ministerial and an application could be made to the Court of Queen's Bench for a *mandamus*. The applicant thereupon made this application. The Court of Queen's Bench, however, held that the duties of the Commissioners were not ministerial but were judicial and therefore *mandamus* could not be granted. I do not see how this case helps the respondent. He cannot take up inconsistent position. He resists *certiorari* on the ground that the order complained of is not a judicial order. He cannot turn round and say that *mandamus* does not lie, because the order is a judicial one and not merely a ministerial or executive act.

The learned Advocate-General then argued that the power having been validly delegated and the respondent having exercised the power in good faith, this Court should not substitute its own opinion for the opinion of the respondent and interfere with the order. He relied on the observations of Ameer Ali, J., in *In re: Sm. Lakshminoni Dassi* (1). It is now firmly established that where such power as is mentioned in Rule 75A is given to any particular authority and the exercise of the power is only dependant on the opinion of that authority, then the formation of the opinion of that authority is clearly a matter for executive direction and cannot be questioned in a Court of law. The Court cannot investigate into the grounds or the sufficiency or otherwise of the materials or evidence on which that opinion is formed and substitute its own opinion for that of the authority concerned. (See *Liversidge v. Sir John Anderson* (2). It is equally well established that if such power is exercised in bad faith or for a collateral purpose, it is an abuse of the power and not in reality an exercise of the power and the Court can interfere with such colourable exercise of power. Where the issue is raised as to bad faith or collateral purpose, the Court has to investigate the matter and decide the issue. I had occasion to deal with this aspect of the matter in my judgment in *In re: Banwarilal Roy* (3) and I

(1) (1940) 45 C. W. N. 401.

(2) [1942] L. R. A. C. 206.

(3) (1944) 48 C. W. N. 766.

adhere to what I said in that case. In the case now before me, the good faith of the respondent is not challenged in the sense that the charge of ill-will sought to be made out in the petition is not persisted in. What is insisted on is that the order in its true meaning and effect is wholly outside the purview of Rule 75A, and beyond the power entrusted to the respondent under that rule. This issue having been raised it is incumbent on me to consider and decide it. This leads me to a consideration of Mr. Chatterjee's second contention.

The point was formulated by Mr. Chatterjee as follows: Rule 75A is concerned with requisition and acquisition of property, movable in the sense of chattels, and immovable. It does not authorise the requisitioning of any business or commercial undertaking. General control of industry etc., is secured by Rule 81. He relied on the case of *Lahore Electric Supply Co. Ltd. v. The Province of Punjab* (1). In that case Young, C. J., after reviewing some of the English decisions, held at p. 638 that the Court could interfere if it was satisfied either that the order under Rule 75A was *ultra vires* or that the order was not made *bona fide* but for some collateral purpose. Then at p. 639 the learned Chief Justice held that Rule 75A was not applicable at all to the requisition or acquisition of an undertaking. I did not understand the learned Advocate General to controvert the principles laid down in that Lahore case.

The learned Advocate-General faintly suggested that an hotel was not an "undertaking". The dictionary meanings of "undertaking" are "that which is undertaken; any business, work or project which a person engages in, or attempts to perform; an enterprise; a promise or engagement." The word "undertaking" is defined in Rule 81 as meaning "any undertaking in way of any trade or business and includes the occupation of handling, loading or unloading goods in the course of transport." In *Medawar v. Grand Hotel Co.* (2), Lord Justice Bowen, at p. 25, and Lord Justice Fry at p. 28 referred to the mode in which "the business of an hotel" was carried on. In *Lamond v. Richard and The Gordon Hotels, Ltd.*, (3), Lord Esher, M. R., referred to the proprietors of the hotel as "those who carried on the business of the hotel". I have no doubt in my mind that an hotel is a busi-

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(1) (1943) L. L. R. 24 Lahore, 617.

(2) (1891) L. R. 2 Q. B. 11.

(3) (1897) 1 Q. B. 541 (543).

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ness and consequently an "undertaking" in ordinary as well as in legal parlance.

The learned Advocate-General next contended—and this was his main argument on this point—that by the impugned order only the buildings, being the remaining portion of the Continental Hotel, 12, Chowringhee Road which had not been previously requisitioned, had been requisitioned. He referred me to the text of the order in the Lahore case (1) at p. 629 and said that by that order Government not only requisitioned all property, both movable and immovable, but also the employees in order that the supply of electrical energy might not be interfered with. There the whole "undertaking" as a going concern had been requisitioned. The company there could not carry on any other business anywhere else of supplying electrical energy without a fresh license under the Indian Electricity Act. In the case now before the Court, argued the learned Advocate General, the business or its goodwill had not been affected or impaired in any way and the petitioner was free to carry on his business of Continental Hotel at any other place in Calcutta or even at the next-door. It is quite true that in the Lahore case (1) the whole circumstances precede the requisition order and the very terms of the order made it quite plain and obvious that the whole of the undertaking as a going concern had been requisitioned and it was easy to apply the principles laid down by the learned Chief Justice. What are the circumstances and facts now before me? Here I have a petitioner who has been carrying on this hotel business for the last 30 years at this particular place for which he pays rent at Rs. 4,000 per month besides municipal taxes. On the ground floor he had a restaurant and on the first floor he had accommodation for boarders and lodgers. Since the commencement of the war his customers have been mainly military personnel. The Government requisitioned and took possession of practically the whole of the ground floor which used to be utilised as a restaurant and it is being run as a restaurant or canteen for military personnel. Now the Government has requisitioned the remaining portion of the Continental Hotel that had not been requisitioned previously. A lady and a gentleman arrived to take charge of the place for the purpose, as they said, of running it as an hotel for military personnel. What, I ask, is an hotel business, apart from the place where it is located, the amenities and environments of the place, the furniture, fixtures and fittings and utensils and services which

(1) (1945) I. L. R. 24 Lah. 617.

are available at the place, the name in which it is carried on, the skill of management and the customers on whose patronage it depends? The Government threatens to take over the place where the petitioner's business has been carried on. The furniture, fixtures and fittings are mentioned in the recital in the order as properties considered necessary to be requisitioned along with the buildings, although in the operative part only buildings are mentioned. The place will be run as an hotel for the same class of customers who are in the habit of patronising the petitioner's hotel. What, then, is left of the petitioner's business? The petitioner is left with only the name and his skill of management. Where will he apply this skill? It is said he may start an hotel at any other place. The argument of the learned Advocate-General proceeded on the assumption that the place of business had no importance or advantage for a business. I do not agree.

"Goodwill" was defined by Lord Eldon in *Crutwell v. Lye* (1) as "nothing more than the probability that the old customers will resort to the old place" and by Wood, V. C., in *Churton v. Douglas* (2) as meaning "every advantage.....that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business". The subsequent observations of the learned Judge show that in some business, e. g., a nursery business or a retail shop the locality is the important element of the goodwill and in the other businesses, e. g., a large wholesale business the name is the important element.

In *Ex parte Punnett : In re Kitchin* (3) which was concerned with a public-house Sir George, Jessel, M. R. said at p. 233 :

"It is quite plain that the goodwill of a public-house passes with the public-house. In such a case the goodwill is the mere habit of the customers resorting to the house. It is not what is called a personal goodwill".

The local situation of goodwill was much discussed in the House of Lords in *The Commissioners of Inland Revenue v. Muller & Co.'s Margarine, Ltd.* (4). It is true that the question arose under the Stamp Act but the observations of their Lordships are

(1) (1810) 17 Ves. 335 (346).

(2) (1859) Johns 174 (188).

(3) (1880) L. R. 15 Ch. D. 226.

(4) (1901) L. R. A. C. 217.

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expressed in general terms. Thus Lord Macnaghten observed at pp. 223-224 as follows :—

"What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates. Goodwill is composed of a variety of elements. It differs in its composition in different trades and in different businesses in the same trade. One element may preponderate here and another element there".

Further the same noble and learned Lord said :—

"For my part, I think that if there is one attribute common to all cases of goodwill, it is the attribute of locality. For goodwill has no independent existence. It cannot subsist by itself. It must be attached to a business. Destroy the business, and the goodwill perishes with it, though elements remain which may perhaps be gathered up and be revived again. No doubt, where the reputation of a business is very widely spread or where it is the article produced rather than the producer of the article that has won popular favour, it may be difficult to localise goodwill. But here, I think, there is no difficulty".

To the like effect is the observation of Lord James of Hereford at p. 228 :—

"I entirely dissent from the view that the goodwill of a business, either wholesale or retail, cannot be locally situated. On the contrary, I should say that the goodwill of most businesses is locally situated. There may be exceptions, but this case is not one of them".

The portion of the speech of Lord Brampton at pp. 230-231 is indeed instructive. After pointing out that there was a difference between the sale of a goodwill together with the premises in which the trade is then carried on and the sale of a goodwill without any interest in land or buildings connected with it, his Lordship at p. 231 proceeded as follows :—

"In the first of these cases the trade and the premises are inseparable so long as the trade is there carried on. The advantages and facilities constituting the goodwill are all more or

less derived from them, or the profitable results of such goodwill are therein realised. The goodwill of a trade carried on in a shop is as essential to the tradesman as the shop itself, which is benefited by it. What is the trade of a shop but the business done in it and how is that custom brought to the shop but by the goodwill attached to it? The combination of a suitable shop with the trade done in it, and the goodwill inducing that trade, seem to me to be inseparable. In my judgment, it matters not whether the business be a manufacturing one, or that of a shop-keeper, or a publican, or a brewer; in each case the seller of his business premises with his goodwill sells, and the purchaser buys, the outgoing man's premises, with, so far as in him lies, the whole business carried on therein as a going concern, with the same prospects the vendor himself would have had, had he continued it, and I think it immaterial whether the business has been built up by reason of the personal good qualities of the outgoer, the goodness of his wares or merchandise, the good situation of the premises, or the absence of competition; in each case the business and custom, in fact, have been attracted to the house or premises and when the incomer takes possession he takes all the chances offered and conveyed to him by his purchase, of standing, so far as the business is concerned, in the shoes of the outgoer, and he must rely upon his own good qualities and aptitude for his undertaking to continue the prosperity of the business and profit by his bargain".

The following quotations from the speech of Lord Lindley at p. 235 are material :

"Goodwill regarded as property has no meaning except in connection with some trade, business or calling. In that connection I understand the word to include whatever adds value to a business by reason of situation, name and reputation, connection, introduction to old customers, and agreed absence from competition, or any of these things, and there may be others which do not occur to me. In this wide sense, goodwill is inseparable from the business to which it adds value, and in my opinion, exists where the business is carried on....."

"That in some cases and to some extent goodwill can and must be considered as having a distinct locality, is obvious, and was not in fact disputed. The goodwill of a public house, or of a retail shop is an instance. The goodwill of a business usually adds value to the land or house in which it is carried on if sold with the business, and so far as the goodwill adds value to land

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and buildings, the goodwill can only be regarded as situate where they are. In such a case the goodwill is said to be annexed to them".

The above observations have been adopted as general definitions of "goodwill" in *Simpson v. Charington & Co. Ltd.* (1).

The authorities mentioned above clearly establish that some attribute of locality is common to all cases of goodwill. Goodwill emanates from a particular centre or source. It has a local habitation. It draws custom home to the source from which it emanates. This is obviously so in the case of a retail shop, a brewery or a public-house. The same considerations, in my opinion, apply to an hotel and particularly a residential hotel. I have no doubt in my mind that the situation of Continental Hotel on Chowringhee Road facing the Maidan, its proximity to places of amusement and shopping centres are calculated to attract customers to it. Further, a residential hotel may well acquire a reputation for the size and comfortable arrangement and ventilation of its rooms and the other amenities attached thereto. The goodwill of an hotel business may and does easily become attached to a particular house. The attribute of locality is, in my opinion, of very great importance so far as the goodwill of an hotel business is concerned. The Continental Hotel on Chowringhee Road is certainly not the same thing as Continental Hotel, say, on Bowbazar Street. It is said that the petitioner may start an hotel at any other house on Chowringhee Road. If houses suitable for an hotel were so plentiful on the Chowringhee Road, why does the Government consider this particular place as specially fit for being requisitioned? Obviously, because this place is specially suitable as an hotel, has a reputation and is well known and can be easily taken over as a going concern. The restaurant on the ground floor which, since the war, was patronised mostly by military personnel has been requisitioned and is being run as a canteen for military people. The remaining portion of the Hotel is being sought to be requisitioned for running a same kind of establishment as is being run by the petitioner and for the same class of customers. It is quite clear that by requisitioning this house the authorities expect to get an hotel as a going concern, and intend to run it by some person of their choice namely, Mr. and Mrs. Lettington. Thus by requisitioning the buildings the authorities are in fact and in reality taking over not only the buildings but the goodwill of the petitioner's business

(1) [1934] 1 K. B. 64.

which is attached to the buildings. It may be possible for the petitioner to start an hotel under the same name elsewhere but that will really be a new business without the goodwill that emanated from its present location. His existing business which is a going concern, which has had for the last 30 years its habitation in these buildings where his customers have been attracted will be gone for ever. This appears to me to be the real substance of the matter. In my judgment the impugned order not only requisitions the buildings as the learned Advocate-General contended, but under the guise of requisitioning the buildings it also requisitions the business undertaking of the petitioner, for the goodwill of his business which is attached to the buildings must necessarily go along with them. This cannot be done under Rule 75A, as has been held in *The Lahore Electric Supply Co.'s* case (1) to which I have already referred. Even if the order does not directly requisition the business, it certainly indirectly does so. It is a quite well established principle of law that a thing which cannot be done directly cannot be done indirectly. This principle has been applied to a variety of cases and I need only refer to the cases of *Tagore v. Tagore* (2); *Rajender Dutt v. Sham Chund* (3); *Rajomoyee Dasse v. Troylukho Dasse* (4); *The Attorney-General v. Bovee* (5); *Robinson v. Hardcastle* (6); *Doe v. Carter* (7), *Hughes v. Statham* (8) and *Booth v. Bank of England* (9).

The matter may, I think, be also looked at from another angle. Even if it were held that by the impugned order only the buildings have been requisitioned yet requisitioning the place where the hotel business has been carried on for all these years destroys the business for all practical purposes and deprives the petitioner of the goodwill of his business or a very important part thereof. This goodwill is property. Therefore the petitioner will be deprived of his property. This, under section 299 (1) of the Government of India Act cannot be done save by authority of law. The only law by which a person's business or goodwill

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(1) (1943) I. L. R. 24 Lah. 617.

(2) (1872) 9 B. L. R. 377 (402); 18 W. R. 359.

(3) (1880) I. L. R. 6 Calc. 106.

(4) (1901) I. L. R. 29 Calc. 260.

(5) (1886) 15 M. &amp; W. 60 (71.)

(6) (1788) 2 T. R. 241 (252.)

(7) (1799) 8 T. R. 300 (301.)

(8) (1825) 4 B. &amp; C. 187 (193.)

(9) (1840) 7 Ch. &amp; Fin. 509 (539.)



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thereof may be impaired or affected and to which I have been referred is to be found in Rule 81. To deprive the petitioner of his business undertaking by an order purported to be made under Rule 75A—for that will be the inevitable result of the order—amounts, in my opinion, to depriving the petitioner of his property otherwise than by authority of law and is opposed to section 299 (1) of the Government of India Act, 1935

For reasons stated above the impugned order, in my judgment, is *ultra vires* Rule 75A and cannot stand. If the order which is an administrative or ministerial order is illegal, there can be no difficulty in granting a mandatory order under section 45 of the Specific Relief Act. I accordingly direct and order the respondent to do the following act, namely to withdraw or cancel the order complained of and forbear from enforcing the impugned order. The Rule is therefore made absolute to this extent. The petitioner will be entitled to the costs of this application.

*Fowler & Co.*: Solicitors for the Petitioner.

*S. M. Basu*: Solicitor for the Opposite Party.

P. S ; S. C.

*Rule made absolute.*

## APPELLATE CIVIL.

*Before Mr. Justice R. C. Mitter and Mr. Justice N. A. Khundkar.*

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November, 30,  
December, 13.

BHUPENDRA NATH ROY CHOUDHURY

v.

MONORANJAN BHUIA AND ANOTHER.\*

*Bengal Money-lenders Act, (X B. C. of 1940), section 36—Reliefs under, if may be granted, in respect of mortgage-debtor, satisfied by transferring mortgaged premises before January 1st, 1939—Suit under, if Has.*

Where a debt has been discharged by amicable payment before the 1st January, 1939, the Court has no power to grant any of the reliefs mentioned in section 36 of the Bengal Money-lenders Act.

\*Appeal from Original Decree No. 126 of 1942, against the decree of Mazharuddin Ahmed Esq., Subordinate Judge, 3rd Court, Zillah Dacca, dated the 19th September, 1941.

It makes no difference in principle where the loan has been fully satisfied either by payment in cash or in kind or by accord and satisfaction.

Where, therefore, a mortgagor transferred the mortgaged premises in consideration of the sum found to be then due on the mortgage-bond on an account having been made up and interest calculated at the bond rate of 9½ per cent per annum, compound interest, long before the 1st January, 1939, and instituted after the Bengal Money-lenders Act had come into force a suit under section 36 of the Act, for reliefs mentioned therein :

*Held*, that the Court had no power to grant the reliefs.

Appeal by the Borrower Plaintiff.

Suit under section 36 (1) of the Bengal Money Lenders Act.

The material facts will appear from the judgment.

*Dr. N. C. Sen Gupta, Mr. Radhica Chandra Chatterji and Mr. Satya Priya Ghose* for the Appellant.

*Messrs. Hiralal Chakravarty and Bhagirath Chandra Das* for the Respondents.

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The judgment of the Court was as follows :—

The appellant borrowed Rs. 12,000 from the respondents on the 27th February, 1929, on the security of his house at Dacca. The mortgage instrument provided for compound interest at the rate of 9¾ per cent per annum. On the 8th October, 1937, an account was made up and a sum of Rs. 24,000 was found due to the mortgagees. Apparently interest was calculated at the bond rate in making up this account. On that date the appellant by a registered conveyance (Ex. A) sold the mortgaged premises to the respondents in consideration of the said sum, which as we have already stated, represented the amount of the loan then due.

On the 1st September, 1940, the Bengal Money-lenders Act came into force. On the 6th February, 1941, the appellant instituted the suit in which this appeal arises for relief under section 36(1) of that Act. He asked the Court to reopen the said sale, and determine the amount of his indebtedness by scaling down interest, give him back possession and to allow him to pay the amount that may be found due by instalments. He stated in his plaint that after the mortgage he had improved the mortgaged premises at considerable costs. If some of the improvements which he had to make under compulsion at the instance of the Dacca Municipality be taken into account he was entitled to get from the mortgagees a sum of Rs. 7133-5-4 for which he asked for a

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decree. This was his alternative prayer which was abandoned in the lower court and has not been urged before us.

The learned Subordinate Judge dismissed the suit. He held that the suit was not maintainable in view of the fact that the mortgage debt had been satisfied fully in October 1937, long before the Bengal Money-lenders Act had come into operation, and so no relationship of creditor and debtor was subsisting between the parties when the suit was instituted. Hence this appeal.

A faint attempt was made before us by the appellant's advocate to show that there is no legal evidence to support the finding of the lower court that the mortgage debt had been fully satisfied in October 1937, but that point was not ultimately pressed. There is also good evidence to support that finding. The questions of law therefore are :

(1) Is the suit maintainable, seeing that the plaintiff was not a borrower at the date of the suit and

(2) Assuming the suit to be maintainable can the said sale be reopened.

Section 36 of the Act defines the powers of the Court and also lays down the procedure through which relief is to be obtained. The procedure can be summarised in the following manner :

(1) Where a suit for enforcement of the loan or a suit for redemption as the case may be is pending at the time when the Money-lenders' Act comes into force. In such a case the Act might and ought to be invoked by the borrower in that suit.

(2) Where such a suit had ended in a final decree before the Act had come into force: If the suit was pending on the 1st January, 1939, or if there were any proceedings pending on or instituted after that date which would bring the suit within the definition of a suit to which the Act applies the borrower is to seek relief either

(a) through an application for review filed within the time mentioned in section 36 (6) (a) (ii) ; or

(b) by taking an objection in the execution proceedings, provided that execution is in the Court which had passed the decree. [*Mohini Ranjan v. Surendra* (1).]

(3) Where no such suit had been instituted at all the borrower is entitled to seek relief either

(a) through an application under section 38 of the Act, or

(b) by an independent suit for relief provided for in the first paragraph of section 36(1).

In cases falling under the second heading a suit for relief would seem to be the only means available to a borrower, where the time for filing review had passed and the execution has been taken by the lender in a transferee Court, not the Court which had passed the decree.

The legislature has put the different methods for obtaining relief as indicated above, so to say, in a lump. The doctrine of *res judicata* may have to be applied if the borrower fails to avail himself of the procedure indicated above in a case coming within the first head and the question of election of remedies may have to be invoked if he fails in his attempt to obtain relief by one method and then seeks relief by another, when more than one way is open to him according to the language of the statute. On these questions we express no opinion, as it is not necessary.

In the case before us there is no possibility of a suit by the lender to enforce the loan, for he was fully satisfied in 1937. If the sale cannot in law be reopened by invoking the powers given in section 36 of the Act, a suit for redemption is also out of question.

The learned Subordinate Judge was of opinion that the suit was not maintainable as at the date of the suit there was no relationship of lender and borrower. The decision in *Balai Chand De v. Akshaya Kumar Seal* (1) is inconsistent with that view, though the actual point decided in that case was different. The word "borrower" in the phrase "suit brought by a borrower for relief" occurring in section 36(1) may be descriptive only, but in the view we are taking on the second question of law raised before us, it is not necessary to decide that point also.

One of the powers conferred on the Court by section 36 is that it can reopen any "transaction" between the borrower and the lender, subject to the limitation contained in proviso (1) of section 36(1). A sale by the borrower to the lender in full or part satisfaction of the loan would ordinarily be covered by the word "transaction" occurring in clause (a) of section 36(1), but it would be otherwise if there are other indications of the legislature's intention.

In the case where there has been a decree in respect of the loan the provisions of the statute is clear. The Court would not

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be entitled to invoke any of the powers conferred upon it by the Act for giving relief if the decree had been fully satisfied before the 1st January, 1939. The position however is not so clear where there was no suit in respect of the loan but it had been fully satisfied or paid by the debtor before the 1st January, 1939. If the dues of the creditor be calculated in terms of the engagement which provided for interest at a rate in excess of that mentioned in section 30 of the Act and that amount is paid up before the 1st January, 1939, the court has no power under the Act to direct a refund by the lender to borrower of the excess amount that may be found on a calculation being made in terms of section 30 of the Act. The Act gives a limited power to decree refund, and that power is confined to the case where interest is charged in the accounts or paid after the 1st January, 1939, at a rate exceeding that provided for in section 30 or the amount so paid contravenes that section. Those are the only cases where the court has power to direct payment or refund by the lender to the borrower. It would therefore follow that where the debt had been discharged by amicable payment before the 1st January, 1939, the court would have no power in a suit by the borrower for relief filed after the Act had come into operation to direct a refund to the borrower the amount which may be found to be in excess of what may be found out on calculating interest in terms of section 30 of the Act, and in our judgment it makes no difference in principle, where the loan had been fully satisfied prior to the 1st January, 1939, either by payment in cash or in kind or by accord and satisfaction. This in our judgment is the limitation which the legislature had intended to put on powers of the court though the language of section 36(1) clause (a) has been couched in very wide terms. We accordingly hold that the sale of the 8th October, 1937 cannot be reopened and no accounts cannot be taken on the footing that there is still a mortgage. The appeal accordingly fails.

The result is that the appellant's suit is dismissed but in the circumstances of the case we direct the parties to bear their respective costs throughout.

P. S.

*Appeal dismissed.*

Before the Hon'ble Mr. Justice A. G. R. Henderson

HAFIZUDDIN MANDAL AND OTHERS

v.

MAMHIM CHANDRA GHOSH AND ANOTHER.\*

Civil.

1945.

May, 11, 14.

*Bengal Agricultural Debtors Act, (VII B. C. of 1936, as amended by Act VIII B. C. of 1940) sections 18 and 44—Debt Settlement Board, if has jurisdiction to decide whether a decree of Civil Court is barred—Such decision, if wrongly made, a nullity.*

In an enquiry under section 18 of the Bengal Agricultural Debtors Act, the Board has jurisdiction to determine whether a debt based on a decree of civil court is barred by limitation.

In any case such a decision could not be treated as a nullity; at the most it would be a wrong decision on a point of law reached in an irregular manner and can only be put right by proper procedure.

Second Appeal by Judgment-debtors.

Application to the Debt Settlement Board.

The material facts will appear from the judgment.

*Messrs. Hari Prasanna Mukherjee and Nirmal Kumar Sen*, for the Appellants.

*Mr. Surajit Chandru Lahiry*, (*Amicus Curie*) for the Respondents.

C. A. V.

The judgment of the Court was as follows :—

This appeal is by the judgment debtor and it raises the question whether a Debt Settlement Board has jurisdiction to decide that a debt is barred by limitation. The respondent is not represented here and I am much obliged to Mr. Lahiry for the assistance he has given me as *amicus curie*.

May, 15.

There is no dispute as to the facts. The debt in question is a sum of Rs. 160 payable on a decree obtained by the respondent. The Board determined it at Rs. 160 and called on the respondent to produce a certified copy of the decree. Instead of doing that he produced what is described as a searching slip. The Board examined it and then announced that the debt was barred by limitation. So nothing was due on it.

The respondent filed the present execution case. The appellant objected that execution could not proceed in view of the

\*Appeal from Appellate Order No. 254 of 1943, against the order of R. C. De, Esq., Subordinate Judge of Dinajpur dated the 27th April, 1943, reversing that of M. N. Roy, Esq., Munsif, Balurghat, dated the 30th June, 1942.

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decision of the Board. The Munsif upheld this objection but his decision has been reversed by the Subordinate Judge in the lower appellate court.

The decision of the learned Subordinate Judge was rather half-hearted. He did not go so far as to hold that Boards have no jurisdiction to deal with limitation. He held, however, that they could not do so in the cases of debts based on decrees of civil courts. He based his conclusion on the proviso to section 18(1) which is in these terms :

Provided that a decree of a Civil Court relating to a debt shall be conclusive evidence as to the existence and amount of the debt as between the parties to the decree.

In my judgment this decision cannot be supported. The debt undoubtedly exists. The question the Board was deciding was whether any remedy for recovery was still open to the creditor. In my opinion the Board must have jurisdiction to deal with limitation in all cases or in no cases.

It is, therefore, necessary to consider whether these Boards could decide that a debt is barred by limitation. It was conceded in all the courts that the decision of the Board in this case was absolutely wrong.

The law of limitation is a matter of great difficulty to practising lawyers of long experience. *Prima facie* it might seem strange that questions involving this law should be relegated to the decision of laymen who know nothing about it. But however startling and alarming the result may be, I have reached the conclusion that the decision of the learned Munsif is correct.

In section 45(1) of the Act it is provided that the provision of the Indian Evidence Act and the Code of Civil Procedure shall not apply to proceedings before a Board. There is no reference to the Indian Limitation Act. It could hardly be contended that the provisions of that Act will not apply unless they are specifically extended. In view of the provisions of section 3 I hold, not only that Boards have jurisdiction to deal with this matter, but that an application made after the period of limitation must be dismissed although limitation has not been set up as a defence. It is perfectly true that when a debtor files his application under section 8 for settlement of his debts, this question does not immediately arise. But as soon as he and his creditor are brought face to face in the enquiry under section 18, the Board has to determine the question of the existence of the debt and that implies

the determination of the further question whether it is barred unless the law of limitation has no application.

Mr. Lahiry suggested that when once a Board has determined a debt under section 18 it has no power to alter the decision. But in the present case the question of limitation had not been decided when the Board made its first decision. In view of the very wide connotation of the word 'doubt' in section 18 and the fact that by the power conferred by section 44 a Board may of its own motion review a decision, it seems to me to be impossible to hold that the Board had no jurisdiction to make the decision upon which the appellant relies.

I am, however, further of the opinion that in any view of the case, the decision of the Board could not be treated as a nullity; at the most it would be a wrong decision on a point of law reached in an irregular manner. The respondent ought, therefore, to have appealed against it instead of deciding to treat it as a nullity. I am not prepared to accept the view that it was a nullity and to hold that the appellant is to be deprived of his right to have the debt settled because of this wrong decision of the Board which the respondent made no attempt to put right by the proper procedure.

The appeal must accordingly be allowed, the order of the lower appellate court set aside and that of the Munsif restored.

I make no order as to costs.

P. S.

*Appeal allowed.*

Civil.

1945.

Hafizuddin Mandal

v.  
Mahim Chandra  
Ghosh.



*Before Mr. Justice R. C. Mitter and Mr. Justice  
Latifur Rahaman.*

GOPINATH BISWAS AND ON HIS DEATH HIS HEIR AND  
LEGAL REPRESENTATIVE HARI PADA BISWAS

Civil.

1945

February, 27.

v.

MAULVI MD. NURUL ABSAR, AS COMMON  
MANAGER OF THE KHANPUR ESTATE  
AND OTHERS.\*

*Common Manager, a ointment of—Bengal Tenancy Act, (VIII of 1885 B. C.) sections 93, 94, 95, 98 and 99—Application therefor by several persons—All applicants and opposite parties not co-owners of all the items of property involved, though application contained contrary indication—Failure to appoint common manager within time given by District Judge—Appointment by District Judge—Validity—Mortgage by co-sharers of portion of share—Suit by mortgagee—Decree—Execution—Common manager made party without sanction of District Judge—Sale—Purchase by mortgagee-decree-holder—Symbolical possession delivered—Mortgagee purchaser, if may manage purchased share in Khas.*

Thirty-three persons made an application for the appointment of Common Manager of seventeen items of property comprised in an estate. Another person was subsequently added as a co-applicant. There were two opposite parties to the application. Of those thirty-six persons only the first twenty-nine out of the applicants and the two opposite parties had shares in all the seventeen items. In respect of one item of property only one applicant (No. 34) had an interest and there was no co-owner. There was no indication in the application that all the parties were not co-owners of all the seventeen items. The applicants having failed to appoint a Common Manager within the time allowed the District Judge appointed a Common Manager. Two persons, 5 annas co-sharers, mortgaged 4 annas share in two items of property to another person. The mortgagee sued on the mortgage, obtained decree and proceeded to execute the decree. The Common Manager was made party in the execution proceedings without the sanction of the District Judge. The mortgagee-decree-holder purchased the mortgaged share and obtained symbolical possession. He brought a suit with a view to managing the share in khas after turning out the Common Manager. The questions that arose were (a) whether the order of appointment of Common Manager is a nullity; and (b) what is the effect of delivery of possession to the plaintiff by the Court in the execution proceedings in which the Common Manager had been made a party:

\*Appeal from Appellate Decree No. 493 of 1942, against the decree of M. H. B. Leithbridge, Esq., District Judge of Allpore dated the 12th February, 1942, reversing that of Subordinate Judge of Birbhum, dated the 8th May, 1941.

*Held*, (1) that the appointment of the Common Manager was illegal and the plaintiff was entitled to recover possession from the Common Manager and manage his share himself.

(2) The order of appointment of a Common Manager if made on one application by one order, where several ought to have been made according to the groupings, would be regarded as not *merely* but *substantially* irregular, and even illegal.

*Fazel Ali v Abdul Mosid* (1) and other cases discussed.

There is no difference in the law on the point before the amendment of 1928 and after.

*Obiter*: The appointment of the same man in respect of several groups of estate but by separate order in separate proceedings, though it may not be prudent, would not be illegal, the selection of the man for the office of common manager being a matter of discretion for the District Judge.

(3) In case of non-compliance with the essentials of a procedure as regards notice etc. relating to the appointment of common manager, a suit would lie.

*Secretary of State v. Jotindra Nath Choudhury* (2) and other cases referred to.

Appeal by the Plaintiff.

Suit for possession.

*Dr. S. C. Basak, Messrs. Hirulal Chakravarty and Rabindra Nath Bhattacharjee* for the Appellant.

*Dr. Naresh Chandra Sen Gupta, Mr. M. Asir for Mr. A. Quasem (Sr.)* for the Respondents.

*Mr. Ramendra Mohan Majumdar* for the Deputy Registrar.

The judgment of the Court was as follows :

An estate in Beerbhoom known as the Khanpore estate, comprises seventeen items of immovable property. In 1934 thirty three persons made an application to the District Judge, Beerbhoom, under section 93 of the Bengal Tenancy Act for appointment of a common manager of those seventeen items of property. Another person was subsequently added as a co-applicant. There were two opposite parties to the application, which was based on the grounds mentioned in sub-section (ii) of that section. Of those thirty six persons the first twenty nine out of the applicants and the two opposite parties had shares in all the seventeen items; applicants Nos. 31 to 33 (the Dutts) had shares in items Nos. 1, 2 and 17 and applicant No. 30, (Haripada Biswas), had share in items Nos. 1, 2, 3, 4 and 6 only.

(1) (1887) I. L. R. 14 Calc. 659.

(2) (1924) L. R. 51 I. A. 241 (250.)

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Applicant No. 34 (the added applicant) Binapani Daasi, had a darpatni interest in an  $\frac{3}{4}$  anna share of item No. 1 only. She had no interest in any other property and the other parties to the application had no interest in that Darpatni. The result was that the parties fell into the following five groups :

I. All the parties, except applicant No. 34, were all the co-owners in items 1 and 2 ;

II. Applicants Nos. 1 to 29 and No. 30 and the opposite parties were all the co-owners in items Nos. 3, 4 and 6 ;

III. Applicants Nos. 1 to 29 and Nos. 31 to 33 and the opposite parties were all the co-owners of item No. 17 ;

IV. Applicants Nos. 1 to 29 and the opposite parties were the co-owners of items Nos. 7 and 8 to 16 ;

V. Applicant No. 34 was by herself the sixteen annas owner of the darpatni. No party to the application was her co-sharer. x

There was no indication in the application that *all* the parties were not co-owners of *all* the seventeen items of property. On the contrary the application gave the impression that *all* the applicants and the opposite parties were co-owners of *all* the seventeen items of property. That application was numbered Miscellaneous Case No. 15 of 1934. An order was made by the learned District Judge in terms of section 94 of the Act requiring the parties themselves to appoint a person as Common Manager and on their failure to do so within the time given the District Judge by *an order* appointed respondent No. 1 in 1934 as the Common Manager of all the seventeen items of property under section 95 of the Act. A

Two persons Hemaitulla and Hefazulla, whose representatives were the first twenty nine applicants who had made the application for the appointment of a common manager had 5 annas odd share in all the seventeen items of property. They mortgaged 4 annas share in items Nos. 1 and 2 to the plaintiff appellant Gopinath Biswas. The latter sued to enforce his mortgage and got a final decree for sale. Thereafter he applied to execute the decree. The respondent No. 1 as common manager was made a party to the execution proceedings but without the sanction of the District Judge who had appointed him and continued to be a party throughout those proceedings. At the court sale Gopinath Biswas purchased the mortgaged property in 1935 and the sale was confirmed in 1937. Possession was delivered to

him by court on the 27th and 28th February, 1937. The delivery of possessions was, as it must be in the circumstances of the case, only symbolical. There cannot be any question that he acquired 4 annas share in items Nos. 1 and 2 and has stepped into the shoes of his mortgagors. The substantial question in this appeal is whether he is bound to receive profits from the hands of respondent No. 1, the common manager, or is he entitled to turn out the latter from the management of his share and to manage his share in *his*. With a view to manage his share himself he instituted the suit in which this appeal arises on the 25th March, 1940, in the court of the Subordinate Judge, Beerbhoom. The lower courts have differed, the trial court giving him a decree but the lower appellate court has dismissed his suit. The suit depends upon two questions :

(i) Whether the appointment of respondent No. 1 in Miscellaneous Case No. 15 of 1934 by the District Judge as common manager was illegal that is to say whether the order of appointment is a nullity ; and

(ii) what is the effect of the delivery of possession to the plaintiff by the court in the execution proceedings in which the common manager had been made a party.

The first point is not free from difficulty and requires a critical examination of the provisions of sections 93, 94, 95, 98 and 99 of the Bengal Tenancy Act as they stood before and after the amendment of 1928.

The leading decisions given by this court on section 93 of the Act as it stood before the amendment of that section by Act IV of 1928 are *Fazel Ali v. Abdul Mozid* (1), *Kumar Saradindu Roy v. Collector of Rungpur* (2) ; *Kanailal Ghose v. Beşir Pramanik* (3) and *Jatindra Mohan Ghosh v. Rebati Mohan Das* (4). As far as we are aware there is no decision on the point on the Act as amended in 1928. The last mentioned decision was reversed by the Judicial Committee of the Privy Council on a different point, (L. R. 61 I. A. 171) namely, on the applicability of section 80 of the Code of Civil Procedure to a suit to enforce a mortgage executed by a common manager, but the point relating to the validity of the appointment of the common manager which was dealt with by this Court was not touched by the Judicial Committee.

(1) (1887) I. L. R. 14 Calc. 659.

(2) (1907) 11 C. W. N. 1143

(3) (1914) 26 I. C. 493.

(4) (1931) I. L. R. 59 Calc. 961.

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The amending Act IV of 1928, substantially amended section 93 only. Except with a minor addition, not material to the point before us, sections 94, 95, 98 and 99 stand as they were before. The substantial differences between section 93 before and after this amendment are :

(1) that after the amendment an application (which was not possible before the amendment) for the appointment of a common manager can be made, where there is a dispute as to the management of the joint lands of two or more estates or tenures and

(2) that a common manager can now be appointed for only that portion of an estate or tenure or of only those parts of joint lands in respect of which there is a dispute as to management. A new sub-section namely (ii) was added in section 93 which only enlarged the grounds required for appointing a common manager.

We will firstly review the cases relevant to the point before us, which had been decided before the amendment of 1928. The first case is of *Fazel Ali v Abdul Mozid* (1). That case laid down the proposition that where there are several items of joint property which do not belong to the same set of co-owners one application for appointment of a common manager is not maintainable, but the properties must be divided into groups and there must be a separate application for each one of such groups, each group consisting of properties in which the co-owners the same set of persons. Each one of such application would have to be treated as a separate case and there must be separate orders for appointment—one order in respect of each group of properties. That case was decided on a reference made by the District Judge before whom one application had been made in respect of several estates, in all of which all the applicants did not have shares, but some had shares in common with the opposite parties in some of those estates and the others had in common with the opposite parties shares in the others. The proper procedure to follow in a case of that type was laid down, and though no reasons were given for the answers to the questions referred, the procedure indicated in that case has been accepted as the correct procedure in later decisions of this Court [*Kumar Saradindu Roy v. Collector of Rungpur* (2) ; *Jatindra Mohan Ghose v. Rebati*

(1) (1887) I. L. R. 14 Calo. 659.

(2) (1907) 11 C. W. N. 1143.

*Mohan Das* (1)]. In *Fasal Ali's* case (2) the reference was made and answered at the earliest state of the proceedings, as soon as the application under section 93 was made and therefore no question could be raised or decided as to what would be the legal effect if *one* order of appointment was made under section 95 on *one* application, where by reason of the grouping of estates several applications ought to have been made, each in respect of each group, and separate orders passed. In *Saradindu Roy's* case (3) however, one order of appointment had been made by the District Judge in a case of that type. On revision that order was set aside, and the Collector, who was the applicant was directed, if he desired to have a common manager, to make separate applications—one application for each group of estates or tenures. It was further pointed out that each one of such applications would be a separate case with a separate number requiring a separate order of appointment, though by those several orders the same man, may, in the discretion of the District Judge, be appointed common manager of the several groups of estates or tenures. Some reason was given for the conclusion. The impugned order of the District Judge was held to be defective and was set aside. As the order was set aside in revision this case must be taken to be an authority for the proposition that the procedure would be regarded as materially irregular if only *one* application was made resulting in *one* order of appointment, where by reason of *all* the parties to that application not having interest in *all* the joint properties scheduled to that application separate applications ought to have been made and separate orders of appointment passed. The procedure was not regarded as merely irregular, irregular in form only and not in substance, for then the order made in *Saradindu Roy's* case (3) would not have been set aside in revision. Moreover a critical examination of the provisions of sections 93, 94, 95, 98 and 99 would lead at least to this conclusion namely, that the order of appointment of a common manager if made on one application by one order, where several ought to have been made according to the groupings, would be regarded at least as not *merely* but *substantially* irregular.

On an application being made under section 93 by some of the co-owners of an estate, with the remaining co-owners as opposite parties, a notice must be issued on the co-owners to show cause why the co-owners themselves should not appoint a common

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(1) (1931) I. L. R. 59 Cal. 961.

(2) (1887) I. L. R. 14 Cal. 659.

(3) (1907) 11 C. W. N. 1143.

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manager. Any one of them can appear and contend that there is in reality no dispute as to management. The issue as to whether there is a dispute as to the management so raised must be decided before proceeding to the next stage of the proceedings. If that issue is decided by the District Judge in the negative, the proceedings must terminate then and there. If it is decided in the affirmative or if the co-owners fail to show cause within the time mentioned in the notice, the first stage would end with an order directing the co-owners to appoint a common manager of their choice and the second stage would begin by serving that order under section 94 on such of the co-owners who had not appeared before. The statute requires that the time that must be given to the co-owners to appoint their common manager must be at least one month from the making of that order. If the co-owners agree on a man they are simply to give intimation to the District Judge and the District Judge would have nothing further to do in the matter. The man so appointed by the co-owners would not be under the control and supervision of the District Judge. His salary would not have to be fixed by the District Judge; he has not to submit his accounts to the District Judge and would have no power to move the District Judge for directions and would be under no duty to do so. He cannot be removed by the District Judge, nor can the District Judge release the estate from common management. [*Jogendra Nath Mukherjee v. Khitish Chandra Roy Chowdhury* (1)]. These consequences follow from the language of sections 98 and 99. This is the second stage of the proceedings. The third stage would start only if the co-owners fail to appoint a common manager themselves within time. On that contingency the District Judge is required to appoint a common manager, fix his pay and define his duties. The man so appointed must act under the control and supervision of the District Judge, submit accounts to the District Judge, is liable to be removed by the District Judge and the estate can be released by the District Judge for the reasons mentioned in section 99.

Suppose then there are four estates X, X<sub>1</sub> and Y, Y<sub>1</sub>. The co-owners of the estates X and X<sub>1</sub> are seven persons A to A<sub>3</sub> and B to B<sub>4</sub> and of the estates Y and Y<sub>1</sub> those seven persons and five more namely C to C<sub>5</sub>. The A series make *one* application for appointment of a common manager in respect of all those estates making the B and C series opposite parties and there are no indications in that application, as in the application in the case before us, to show that the C series are not co-owners of X and X<sub>1</sub>. In

this case the properties fall into groups, namely X and X<sub>1</sub>, in which the A series and the B series are the co-owners and (2) Y and Y<sub>1</sub>, in which the A series, B series and C series are the co-sharers.

According to *Fazel Ali's* case (1) and *Kumar Saradindu's* case (2) two applications are to be made, in respect of X and X<sub>1</sub>, with the A and B series as parties, and the other in respect of Y and Y<sub>1</sub> with the A, B and C series as parties. As one application was made, notices issued under section 93 would mention both sets of properties without distinction. If no cause is shown, one order would be made under section 94. If thereafter A and B series give intimation to the District Judge that they have agreed to appoint a person P, as common manager, but C series remain silent, the District Judge would make an appointment himself for all those estates as a matter of course as there was nothing in the application which would indicate that only A and B series and none else were co-owners of the X group, whereas if the correct procedure had been followed, as is indicated in *Fazel Ali's* case (1), the District Judge would have nothing further to do in respect of estates X and X<sub>1</sub> and could appoint a person as common manager of estate Y and Y<sub>1</sub> only. The appointment by him under section 95 of a common manager of all those estates X, X<sub>1</sub> Y and Y<sub>1</sub> would result in the most serious consequences in view of the results which follow from the construction of sections 98 and 99—results which we have indicated above. The notices would be defective and so the whole procedure would in our opinion be fundamentally defective. We would go further and hold that the defect would go to the root of the matter. It would not be a case of substantial irregularity in the procedure only but would make the order of appointment made under section 95 an illegal one. There having been a non-compliance with the essentials of the procedure a suit as the present would lie. This principle had been laid down by the Judicial Committee of the Privy Council in *Secretary of State v. Jotindra Nath Choudhury* (3). This view of ours is in accord with what was decided by a Division Bench of this Court in *Kanailal Ghose v. Besir Pramanik* (4) which held that the order of appointment of a common manager under section 95 would be an illegal order where the formalities imposed by the statute had not been strictly complied with. The mischief in the type of

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(1) (1887) I. L. R. 14 Cal. 659.

(2) (1907) 11 C. W. N. 1143.

(3) (1924) L. R. 51 I. A. 241 (250).

(4) (1914) 26 I. C. 498.



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cases which is before us would be as serious as in cases where the appointment of a common manager is made by an order under section 95 without notices being issued under section 93, or if issued by not serving them on a co-owner or co-owners of the estate proposed to be placed in charge of the common manager. If the order for appointment be an illegal one, a suit would lie at the instance of any co-owner of the estate or estates to recover possession from the person who poses to be the common manager but who is in reality not so, as his appointment was not a valid one: *Indu Bhusan Bose v. Annapurna* (1). The learned advocate for the respondent, however, contends that the order for appointment in type of cases we have before us would not be an illegal one and to support his contention he relies upon the case of *Jatindra Mohan Ghose v. Rebati Mohan Das* (2). An examination of that case, however, does not bear out his contention. In that case Mukerji J. accepted as good the rule of grouping of estates as laid down in *Fazel Ali's* case (3). He held that the mortgage in suit executed by the common manager was a good mortgage as the common manager who had executed it had been validly appointed by the District Judge. The facts in that case as disclosed in the judgment were as follows: there were several revenue paying estates of which the proprietors were the same set of persons. Under those estates were many *patnis*, *taluks* and *shikmi taluks* in all of which, except in one *patni taluk*, the selfsame proprietors were the co-owners. In the other *patni taluk*, however, those proprietors were co-owners but there was another co-owner who had no interest in the revenue paying estates. Two *separate orders were in fact made* by the learned District Judge under section 95, one in respect of the revenue paying estates and the *patni* and *shikmi taluks* falling under the 1st group and another order in respect of the other *patni taluk* in which the extra person was also a co-owner, but the same person was appointed common manager in respect of all the estates and taluks. The fact that separate orders for appointment were made distinguishes the case from the one we have before us. The orders for appointment were perfectly valid, though it may not have been prudent to appoint the same man as common manager of the two groups of property. The appointment of the same man in respect of several groups of estate but by separate order in separate pro-

(1) (1906) 6 C. L. J. 216.

(2) (1931) L. L. R. 59 Cal. 961.

(3) (1887) L. L. R. 14 Cal. 659.

ceedings would not be illegal, the selection of the man for the office of common manager being a matter of discretion for the District Judge. That case therefore does not militate against our view. The conclusion to which we have arrived as indicated above in our opinion represents the law before the amendment of 1928.

The next question is whether the amendment of 1928 makes any difference. Our answer is in the negative. We have already pointed out that sections 94, 95 and 99 remain as before with a slight alteration in section 94 which is not material to the case before us. The three stages in the proceedings also remain as before. As 94, 95, 98 and 99 remain unaltered the consequences are the same as before, where estates in which all the parties are not co-owners are lumped up in *one* application and *one* order for appointment is made under section 95, in respect of all those estates. We have already pointed out how serious those consequences may be, and it is for those consequences that we have held that the appointment of the common manager would not only be materially irregular but illegal.

In the case before us the joint properties over which the respondent No. 1 was appointed common manager fall into four distinct groups, and the *darpatni* which we have placed in the fifth group, was a property in respect of which no common manager could at all be appointed, because no one else except applicant No. 34 had any interest in it. In it there was no co-owner. The appointment of the said respondent as common manager over all the seventeen items of properties by one order is therefore an illegal one. In this view of the matter the other question raised by the appellant is not material and we express no opinion thereon. The plaintiff is therefore entitled to recover possession from respondent No. 1 and manage his share himself till another common manager is legally appointed in a new proceeding.

The result is that this appeal is allowed. The judgment and decree of the learned District Judge are set aside and those of the Subordinate Judge restored. The plaintiff must have his costs throughout from respondent No. 1 personally.

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*Appeal allowed.*

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Gopinath Biswas

v.

Maulvi Md. Nurul

Absar.

## ORIGINAL CIVIL.

*Before Mr. Justice A. N. Sen.*

JAGODISH PROSAD PANNALAL

v.

PRODUCE EXCHANGE CORPORATION LTD.\*

CIVIL

1945.

January, 3.

*Contract for sale of goods—"Delivery", what is—Possession given to carrier, if and when, is 'delivery' to buyer—Sale of Goods Act (III of 1930), sections 2(2), 23(2), 25 and 39—Order promulgated under Defence of India Act fixing price at a rate lower than contract rate and making it unlawful to sell at higher price, if affects material term of contract and if latter "becomes void"—Contract Act (IX of 1872), section 56—The buyer, if entitled to recover the difference between the contract price which he has paid and the price fixed by Defence of India Act—Contract Act, sections 65 and 72—"Advantage received under the contract" in section 65, meaning and scope of—"Mistake" in section 72, if includes "mistake of law"—Difference in scope between sections 72 and 21 of the Contract Act.*

The plaintiff entered into a contract with the defendant for the purchase of certain goods. The goods were loaded on railway wagons on December 27, 1943 by the defendant. In the railway receipt the defendant was the consignee. On January 3, 1944, the railway receipt was endorsed over to the plaintiff and the plaintiff paid the balance of the price. In the meantime on December 16, 1943 a new order was passed under the Defence of India Act fixing the price of the goods at a figure lower than that mentioned in the contract, and the order was made applicable to all contracts in which delivery was to be given on or after January 1, 1944. The plaintiff seeks to recover the difference between the contract price and the price fixed by the Defence of India Act :

*Held*, (I) that the consignee was not the buyer but the seller and the goods were therefore being "transmitted" to the seller and not to the buyer. In such a case 'delivery to the Railway Company' cannot be deemed to be 'delivery to the buyer' within the meaning of section 39 of the Sale of Goods Act.

(II) that the order passed under the Defence of India Act would affect the contract.

(III) that the price being an essential term in the contract the contract as it stood could not be performed without infringing the law and it therefore became void as under section 56 of the Contract Act on the date of the promulgation of the aforesaid order under the Defence of India Act.

(IV) Section 65 of the Contract Act applies only if the advantage is received before the contract ceases to be a contract by becoming void. In this case it was received after and therefore the section does not apply.

\* Original Side Suit No. 207 of 1944.

*Wolf & Sons v. Dadyba, Khimji & Co.* (1) referred to.

(V) Section 21 of the Contract Act deals only with mistakes of law which give birth to a contract ; it has nothing to do with any other kind of mistake. If therefore a payment made under a mistake of law is not the origin of a contract such payment would be refundable under section 72.

The English common law rule that a payment made under a mistake of law is not recoverable can have no application here, where there is a statute governing the question.

*Katharine Stiffler v. Carr Makertich Martin* (2) dissented from.

The plaintiff cannot be permitted to split up the payment made in the way he seeks to do and to treat a part only of such payment as being a payment made by mistake refundable under section 72.

Suit for recovery of the difference between the contract price and the price subsequently fixed by the Government.

The material facts will appear from the judgment.

*Messrs. P. C. Ghose and S. N. Chatterji* for the Plaintiff.

*Messrs. B. C. Ghose. J. C. Sett and D. C. Sethia* for the Defendant.

The following judgment was delivered :

**Sen, J. :** On the 16th of September 1943 the plaintiff firm entered into a contract with the defendant company for the purchase of one wagon of maize starch at the rate of Rs. 77 per cwt. F. O. R. Jagadhri. The maximum price then fixed by the Government of India for the commodity was Rs. 78 per cwt. The goods were loaded on railway wagons at Jagadhri on 27th December, 1943, by the defendant company. In the railway receipt the defendant company was the consignee. On 3rd January, 1944, the railway receipt was endorsed over to the plaintiff firm and the plaintiff paid the balance of the price of the goods on that date. In the meantime on 16th December, 1943, a new order was passed by the Government of India making Rs. 48 the maximum price. This order was applicable to all contracts in which delivery was to be given on or after January 1st, 1944. The plaintiff seeks to recover the difference between the contract price of Rs. 77 per cwt. and the maximum price of Rs. 48 per cwt. fixed by the order of the Government of India. In the plaint the allegation was that the defendant company suppressed the fact that such an order had been passed and was guilty of misrepresentation. That charge is now abandoned. The plaintiff firm also claimed that the defendant company could not charge more than Rs. 47 per cwt. i.e. Rs. 1 less than the maximum price. That claim is also abandoned.

(1) (1919) I. L. R. 44 Bom. 631.

(2) (1934) 39 C. W. N. 174 (185).

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The plaintiff now claims the difference between the contract price and the price fixed by Government and the claim is based on the following two grounds viz :—

(I) The contract having become void by reason of the new Government order, the defendant is bound to make compensation to the plaintiff or restore the advantage it has got under the contract. Sections 56 and 65 of the Indian Contract Act are relied upon for this branch of the argument.

(II) The payment in excess having been made by mistake the defendant is bound to refund it. Section 72 of the Indian Contract Act is invoked in support of this contention.

The defendant company's defence is that delivery having been given on 27th December, 1943 when the goods were loaded on railway wagons the new order did not apply and therefore no refund is payable. The second line of defence is that even if it be held that excess payment had been made, it is not recoverable as it was made by reason of a mistake of law and not of fact.

The first question for determination is whether the new order applies to this contract. If there was delivery on 27th December 1943 then admittedly the order does not apply. If however delivery be taken to have been made on 3rd January, 1944, then, again admittedly, the order would apply. Mr. B. C. Ghose for the defendant argued that the contract being F. O. R. Jagdhri delivery took place as soon as the goods were loaded on the railway wagons at Jagdhri in terms of the contract and he referred me to sections 2(2) 23(2) and 39 of the Sale of Goods Act.

Section 2(2) defines delivery as the voluntary transfer of possession from one person to another. Certainly, possession was given to the railway company on the 27th December and there was delivery to the railway company on that date when the goods were loaded on the wagons. But we are concerned here with the question of delivery to the buyer. Can it be said that such delivery to the Railway amounted to delivery to the buyer? Mr. Ghose argues that it does, because delivery to a carrier for transmission to the buyer is prima facie deemed to be delivery to the buyer. He refers to section 39(1) of the Sale of Goods Act which is in the following terms :—

"Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the

purpose of transmission to the buyer, or delivery of the goods to wharfinger for safe custody, is *prima facie* deemed to be a delivery of the goods to the buyer.'"

He meets the objection that the railway receipt was made out in the name of the defendant company as consignee by saying that this act merely reserved to the consignor a right of disposal and that this reservation did not prevent the delivery of the goods to the railway from amounting to delivery to the buyer. He refers to section 25 of the Sale of Goods Act and points out that there may be delivery although the vendor retains a right of disposal.

On behalf of the plaintiff the argument is that as the defendant was the consignee in the railway receipt it cannot be said that the goods were put on the railway for transmission to the buyer.

There can be no doubt that there may be delivery to the buyer even though the seller retains a right of disposal in the goods delivered; but the mere putting of goods on the railway wagons does not necessarily amount to delivery to the buyer. The section says that the goods must be delivered to the carrier *for transmission to the buyer*. The section further says that such delivery to the carrier would *prima facie* be deemed to be delivery to the buyer; the use of the words *prima facie* shows that even if there be delivery to the carrier for transmission to the buyer circumstances may exist which would prevent such delivery from amounting to delivery to the buyer. Here the consignee was not the buyer but the seller. The goods were therefore being transmitted to the seller and not to the buyer. It cannot be said that the railway had been directed to carry the goods to the buyer and that the seller merely retained some right of disposal. The railway was directed to deliver the goods to the defendant company and not to the plaintiff firm. In such a case delivery to the railway company cannot be deemed to be delivery to the buyer. The order passed under the Defence of India Act would therefore affect this contract.

The next question for determination is whether the plaintiff can recover the difference between the contract price and the price fixed by the Government order. I shall first consider the argument of the plaintiff which is based on sections 56 and 65 of the Indian Contract Act. It is argued that the contract became void by reason of the provisions of section 56. Section 56 so far as it relates to the present question is as follows:—

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"A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."

Learned Counsel for the plaintiff contends that the contract between the parties became void when the order under the Defence of India Act was passed making it unlawful for any one to charge a price exceeding the price fixed by the order. He then contends that as the contract became void the defendant who has received an advantage under the contract in the way of the price for the goods in excess of what it was entitled to receive is bound to refund the excess. For this purpose he relies on section 65.

Now did the contract become void on the December, 16, 1943, when the order was passed fixing the maximum price of the goods @ Rs. 48 per cwt. On that date it was made unlawful for any one to charge any price in excess of Rs. 48 per cwt. inasmuch as the order provided that anyone charging more was liable to be imprisoned. It was argued on behalf of the defendant that the contract was not unlawful but that only a term of it was made unlawful and that the contract could still be performed by the payment of the price fixed by the order. I am not impressed by this argument. The main term of the contract had become unlawful. The contract as entered into between the parties could not be performed without infringing the law. Payment of a lesser sum than that fixed by the contract would amount to the alteration of the contract in its essential term and to the substitution of a new contract for the old one. Suppose the defendant company had refused to sell at the new reduced price could the plaintiff firm have forced it to sell? In my opinion it could not. The order under the Defence of India Act does not contain any such compelling provision; no statute had been shown to me under which the defendant could be so compelled, nor can such compulsion be supported on any principle of justice or equity. The contract as it stood could not be performed without infringing the law and it therefore became void on the date of the promulgation of the aforesaid order under the Defence of India Act.

The next question is whether on this account the plaintiff would be entitled to recover the difference between the contract price and the price fixed by the order by invoking the aid of section 65 which is in the following terms :—

"When an agreement is discovered to be void, or when a

contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

In my opinion the answer must be in the negative. Section 65 deals with two matters: (a) an agreement which is discovered to be void and (b) a contract which becomes void.

The first matter is concerned with an agreement which never amounted to a contract because it was void *ab initio*, the fact of its being void being discovered at a later stage. The word used is "agreement" and not contract. I would also stress the use of the word "discovered" in the first part of the section in contradistinction to the word "becomes" in the second part. The word "discovered" connotes the pre-existence of that which is discovered. We are not concerned with such a case. The second matter deals with a contract (i.e. with an agreement enforceable at law) which was good at its inception but which *becomes* void at some later stage by reason of some supervening circumstance. We are concerned with such a case. Now what the section says is that if any body receives any advantage *under such a contract* he is bound to restore it or make compensation for it when the contract becomes void. The advantage must have been received under the contract. Now a contract is an agreement enforceable at law [see section 2(h) of the Indian Contract Act]. The advantage must therefore have been received under an agreement enforceable at law. If the advantage is received after the agreement ceases to be enforceable at law i.e. ceased to be a contract, can it be said that it is an advantage received under the contract? I think not. The section applies only if the advantage is received before the contract ceases to be a contract by becoming void. In this case it was received after and therefore the section does not apply. This view finds support in the decision of the Bombay High Court *Wolf & Sons v. Dadyba, Khimji & Co.* (1).

I next take up for consideration the argument that the sum claimed is recoverable under section 72 of the Indian Contract Act as having been paid under a mistake. Section 72 is as follows:—

"A person to whom money has been paid, or any thing delivered by mistake or under coercion must repay or return it."

On behalf of the defendant the argument is that Section 72 contemplates only a mistake of fact and not one of law. It is

(1) (1919) L. L. R. 44 Bom. 631.

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said that if a sum paid under a mistake of law be recoverable then the provisions of section 21 of the Indian Contract Act would be rendered nugatory. Section 21 enacts that "A contract is not voidable because it was caused by a mistake as to any law in force in British India. The argument of the defendant therefore amounts to this :—" a contract is not voidable by reason of its being caused by a mistake of law, therefore, a payment made under a mistake of law must be irrecoverable." Put thus it seems to me that this argument is not supported by logic. Section 72 uses the word "mistake" without any qualification. Is there any jurisdiction for engrafting a qualification which is not in the statute ?

The basic rule in construing a statute is to give the words of it their ordinary grammatical meaning. One must not depart easily from this rule. I am not unmindful of another principle of construction viz. that one must always endeavour to give effect to every part of statute and adopt, whenever possible, a construction which has this effect in preference to a construction which would render a part of the statute nugatory. Both these principles should be worked in harmony. Now if the word mistake in section 72 is given its ordinary meaning viz. a mistake of any kind—an unqualified mistake—does any conflict necessarily arise between that section and Section 21 ? I think not. Section 21 speaks not of a payment made, under a mistake of law but of "a contract caused by a mistake of law". Section 72 does not speak of a contract at all but merely of a payment made under a mistake. The section appears in chap. V which does not deal with contracts but "with certain relations resembling those created by contract". As I read it, all that section 72 says is this : "If a person makes a payment under a mistake ( of law or of fact ) a relationship resembling a contract is created under which the person receiving the payment is bound to return the money". A payment may be made by mistake without there being any contractual relationship at all between the parties. A may pay a sum to B under the mistaken belief that he is in law bound to maintain B, then there is no contract between the parties voidable or otherwise. If the law declares such a payment refundable it does not in any way conflict with section 21 as no contract is involved. Again a payment may be made in the course of contract under a mistake of law without such payment being the "cause of the contract". In such a case also the refund of that payment would not render section 21 nugatory. That

section deals only with mistakes of law which "cause a contract" or which give birth to a contract; it has nothing to do with any other kind of mistake. If therefore a payment made under a mistake of law is not the origin of a contract such payment would be refundable under section 72. This is how I would construe section 21. I think that a certain amount of confusion has been caused by reason of the importation of the English Common Law rule regarding the recovery of payments made under a mistake. The English Common Law rule that a payment made under a mistake of law is not recoverable can have no application here, where there is a statute governing the question. I would therefore respectfully disagree with the dictum of Lord Williams, J., in the case of *Katherine Stiffles v. Carr Makertich Martin* (1). This dictum is based on the assumption that the English Common Law doctrine regarding this subject is applicable to India.

The question remains whether in this case the plaintiff is entitled to recover the sum claimed. Can it be said that the difference between the contract price and the maximum price fixed by the Government order represents a payment made by the plaintiff by mistake? In my opinion it cannot; when the contract becomes void, the plaintiff could have refused to pay anything at all and in that case he would have had to return the goods. If he paid the contractual sum in ignorance of the fact that the contract had become void that would be a payment by mistake. He could then recover the entire amount paid and return the goods. Here the entire contractual price had been paid by mistake. The plaintiff cannot be permitted to split up the payment made in the way he seeks to do and to treat a part only of such payment as being a payment made by mistake refundable under section 72. To do so would be to permit the plaintiff to enforce a new contract on the defendant company. As I have pointed out before, the Government order contains no such compelling clause, it merely prohibits the sale above a certain maximum price but it does not compel any one to sell at that price.

I hold therefore that the plaintiff cannot seek the aid of section 72 of the Contract Act in the manner in which it has sought to do. This suit must therefore be dismissed with costs. Certified for two Counsel.

*G. Bagaria*, Solicitor for the Plaintiff.

*K. K. Dutt & Co.*, Solicitors for the Defendant.

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*Suit dismissed.*

(1) (1934) 39 C. W. N. 174, (185).

Civil

1945.

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Sess. Y.

Before Mr. Justice B. K. Mukherjee and Mr. Justice  
T. H. Ellis.

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1945.

January, 12, 15,  
16, 17 and 22.  
March, 6.

## THE PROVINCE OF BENGAL

v.

MIDNAPORE ZEMINDARY COMPANY LIMITED  
AND OTHERS \*

*Code of Civil Procedure (Act V of 1908), section 80—Notice—Calculation, if date of service to be excluded in—Temporarily settled estate—Resumption—Regulation II of 1819—Proprietary right—leased out in pakti right—Right to have periodic settlements as proprietor transferred to lessee—Lessee recorded in such settlement as tenure-holder—Refusal of proprietor to take settlement—Government take over direct management—Regulation VII of 1822—Government, if successor or representative of proprietor—Bengal Tenancy Act (VIII of 1885), Chapter X—The revenue officer, if can ignore the terms of lease regarding rent—section 104 (H) and (Y).*

The period of two months as laid down in section 80 Civil Procedure Code should be taken as exclusive of the day on which the notice is served.

*Castle v. Burditt* (1); *Res v. Adderley* (2); *Glaslington v. Rawlins* (3); *Lester v. Garland* (4); *Young v. Higgon* (5); *Blunt v. Heslop* (6); *Browne v. Black* (7); *Bhagchand v. Secretary of State* (8) discussed.

The suit should be regarded as premature and unsustainable *in limine* for non-compliance with the provision of section 80 Civil Procedure Code.

Before the passing of the Bengal Tenancy Act, 1885, the position was that where *deans* lands were resumed by Government and formed into a temporarily settled estate and settled with the proprietor, the settlement of rent by the revenue authorities could not disturb the contractual rights as between the proprietor and the intermediate tenure-holder under the lease. This only happens where the proprietor who had granted the lease took settlement of the new towai but not otherwise.

\* Appeal from Original Decree No. 170 of 1940, against the decree of J. N. Basu Roy Esq., Subordinate Judge of Zilla Nadia, dated the 31st July, 1940.

(1) (1790) 3 T. R. 623; 100 E. R. 768.

(2) (1780) 2 Doug 463.

(3) (1803) 3 East 407; 102 E. R. 653.

(4) (1808) 15 Ves 248; 33 E. R. 748.

(5) (1840) 6 M & W 50.

(6) (1838) 8 Ad & El. 577.

(7) [1912] 1 K. B. 316.

(8) (1927) L. R. 54 I. A. 338; 46 C. L. J. 76.

*Priyath Das v. Ram Tarun Chatterjee* (1) referred to.

After the passing of the Bengal Tenancy Act, 1885, section 192 (which now forms part of section 191) did not empower the revenue officer to fix rent affecting contracts made before the Act. Even if he had so fixed rent, the grantor of lease though becoming the holder of the estate could not recover rents on this basis, in excess of that reserved in lease and the tenant could, on the basis of such lease, resist any suit by such landlord for recovery of rent settled by the Revenue Officer even though the tenant did not challenge the entry of rent in settlement roll under section 104 (H).

*Khiroda Kania Roy and others v. Akshoy Kumar Chatterjee* (2); *Muktahesi v. Srinath* (3); *Prafulla Nath Tagore v. Tweedie* (4); *Sarada v. Prafulla* (5) and *Midnapore Zemindary Company v. Chandra Singh Dudhuria* (6) discussed.

*Chandra Singh Dudhuria v. Midnapore Zemindary Company* (7) followed.

Except in cases where section 191 Bengal Tenancy Act applies, if there is a contract between the proprietor and the tenant which according to the revenue officer was subsisting at the time of settlement proceedings and which determines the rent in a particular way, the revenue officer is bound to give effect to his own views of the terms of the contract and fix the rent on the basis of the same, and it is immaterial whether the settlement is accepted by the proprietor himself or by a stranger.

The Government is in no sense an agent of the proprietor though it was so described in the settlement records yet it occupies the position of landlord with regard to all subsisting subordinate tenures under the estate.

Appeal by the Defendant.

Suit for declaration that the rent roll by Revenue Officer was *ultra vires*.

The material facts appear from the judgment.

*Dr. Sarat Chandra Basak* and *Mr. Rama Prosad Mookerjee* for the Appellant.

*Messrs. Atul Chandra Gupta, Gopendra Nath Das, Birendra Nath Sen Gupta* and *Jnanendra Nath Mukherjee* for the Respondent No. 1.

*Messrs. Pramatha Nath Mitra* and *Samarendra Krishna Deb* for the Respondents Nos. 2 to 5.

C. A. V.

(1) (1903) L. R. 30 I. A. 159; I. L. R. 30 Cal. 811.

(2) (1916) 33 I. C. 420.

(3) (1914) 19 C. L. J. 614.

(4) (1921) 35 C. L. J. 14.

(5) (1937) 65 C. L. J. 583.

(6) (1938) 68 C. L. J. 305.

(7) (1941) 46 C. W. N. 802 P. C.; L. R. 69 I. A. 51.

Civil

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The judgment of the Court was as follows :—

**Mukherjee, J.** :—This appeal is on behalf of the Province of Bengal and is directed against a decree of the Subordinate Judge of Nadia, dated July 31, 1945, made in a suit commenced by the plaintiff respondent under section 104 (H) of the Bengal Tenancy Act. The facts lie within a short compass and may be stated as follow :—

There is a temporarily settled estate known as Sarkarpore Naluapara bearing Touzi No. 893 of the Nadia Collectorate. The lands comprised in this estate were once a part of Bhabananda Deara and were resumed under Regulation II of 1819 some time in 1828. After resumption, a separate estate was formed which is being held in temporary settlement from time to time, the first settlement being made in the year 1842. At that time the proprietor of this estate was Raja Ram Chandra Roy of Nashipore, and as the Raja refused to take settlement, the estate was settled with Robert Watson & Co., the predecessor-in-interest of the present plaintiff. In 1852 the proprietary right to the estate became vested in J. W. Laidley and James Darlymple, two of the partners of the firm of Robert Watson & Co., and by an indenture of lease, dated November 5, 1856, these two persons leased out in permanent *patti* right their proprietary right in Touzi No. 893 as well as in the permanently settled lands of Taraf Nakra of Pargana Goas appertaining to 8 annas share of Touzi No. 523 of the Murshidabad Collectorate, to Robert Watson & Co., at a fixed consolidated rental of Rs. 5,483/5/1 p. a year. There was a clause in the *patti patta* by which the lessors purported to convey to the lessees their rights to have periodical settlement of the temporarily settled estate as proprietor. On the basis of the clause, it appears, proprietary settlements of Touzi No. 893 were made with Robert Watson & Co. and then with their successor-in-interest, the present plaintiff, from time to time and this state of things continued till 1920. In 1920 a fresh revenue settlement was made which came into operation with effect from the 1st of April 1921, and during these settlement operations, it was detected that the Midnapore Zemindary Co. was merely a tenure-holder and not a proprietor of Touzi No. 893 and the clause in the *patta* on the strength of which proprietary settlements were made with them was in no sense binding on the Government. The result was that in the settlement records of 1920 which recorded the rents of all classes of tenants, Raja Bijoy Singh Dudhuria and others, who are represented by defendants 2 to 5 in this suit, were recorded as proprietors of the

said Touzi and the Midnapore Zemindary Co. was described as a tenure-holder under them. The proprietors however refused to take settlement of Touzi No. 893 which was kept under the direct management of the Government for some time and then a farming settlement was concluded with the Midnapore Zemindary Co. which lasted till 1936. In 1923 the plaintiff company filed a suit for establishment of their proprietary right to Touzi No. 893. That suit was dismissed by the trial Court and also by the High Court on appeal. An appeal was then taken by the Company to the Privy Council, but that appeal was eventually withdrawn. In 1937 fresh survey and settlement proceedings began under Part II, Chapter X of the Bengal Tenancy Act and settlement officer assessed a rent of Rs. 13,379-10-0 under section 104, Bengal Tenancy Act in respect of the *putni* held by the plaintiff company under Touzi No. 893. Being aggrieved by this assessment, the plaintiff company took an appeal to the Director of Land Records and contended *inter alia* that the *putni* being created not only in respect of the lands of Touzi No. 893 but of the permanently settled lands of Touzi No. 523 as well, at a fixed consolidated rent, the rent fixed by the contract was binding both on the zemindars and the revenue officer and the latter had no jurisdiction to settle the rent of the *putni* ignoring the said contract. The appeal was dismissed by the Director of Land Records on July 15, 1938. Eventually the Dudhuria zemindars did not accept the new periodical settlement this time either, and the Government took over khas management of the Touzi under its powers under Regulation VII of 1822. The plaintiff filed the present suit on January 11, 1939, making the Province of Bengal and the Dudhuria zemindars parties defendants and praying for declaration that the rent-roll made by the Revenue Officer in contravention of the contract embodied in the *putni* lease which was prior to the Bengal Tenancy Act, was unauthorised, illegal and *ultra vires* and that the plaintiff company was not liable to pay as *putnidar* the assessed rent of Rs. 13,379-10 a year.

The suit was contested primarily by the Province of Bengal. The Dudhuria defendants filed a written statement supporting the Province of Bengal but did not take any active part in the proceeding. On behalf of the Province of Bengal a large number of the defences were taken. It was contended *inter alia* that the lands of Touzi No. 893 were not covered by the *putni patta* of 1866, that the proprietor of a temporarily settled estate was not competent to create a perpetual tenure and that as in previous settlement

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proceedings rents of all classes of tenants were enhanced and the plaintiff company who took settlement did not challenge the legality of the proceedings, it was not competent to raise any objection now. It was also averred that the contract, if any, fixing in perpetuity the rent of the lands of temporarily settled estate No. 893 was not binding on the revenue officer or on the Province of Bengal, that the suit was barred by *res judicata* and also under section 104(H) clause 3 of the Bengal Tenancy Act and that the notice under section 80, Civil Procedure Code not being a proper or legal notice, the suit was premature and bound to be dismissed on that ground alone.

The trial Judge who heard the suit over-ruled these defences and held *inter alia* that as the *putni* lease created by the proprietors in favour of the plaintiffs company was anterior to the passing of the Bengal Tenancy Act and the contract was subsisting at the date of the settlement, the settlement authorities had not jurisdiction in view of section 191 Bengal Tenancy Act to ignore the terms of the lease and fix rents in violation of the same. Thus the *putni* rent that was assessed under section 104 Bengal Tenancy Act was illegal and without jurisdiction and was not binding on the plaintiff. The result was that the plaintiff's suit was decreed. It is against this judgment that the Province of Bengal has come up on appeal to this Court.

Dr. Basak appearing on behalf of the appellant stated at the outset that he would not dispute the finding of the trial Court that the lands of Touzi No. 893 were covered by the *putni patta* of 1866. He conceded further that a proprietor of a temporarily settled estate is competent to create a permanent tenure at a fixed rate of rent, though such tenure could not be described as a *putni* tenure in the strict sense of the term. The decision of the Court below on the questions of *res judicata* and estoppel has not been challenged before us and Dr. Basak has confined himself to two points only in support of the appeal. He has contended in the first place that as the suit was commenced by the plaintiff before the expiry of the period of two months next after notice was served on the Province of Bengal under section 80 of the Civil Procedure Code, it was premature and was liable to be dismissed on that ground. The other ground put forward is that as in the present case the periodical revenue settlement of Touzi No. 893 was not accepted by the proprietors and the Government has taken khas management under the provision of Regulation VII of 1822, the stipulation in the *putni* lease is not binding on the Government,

which is in no sense an agent of or successor to the proprietor and consequently the revenue officer had ample jurisdiction to ignore the contract between the zemindar and the patnidar and settled rent in such way as he considered proper. We will consider these two points one after another.

So far as the first point is concerned, it appears that notice under section 80, Civil Procedure Code, was served on the Collector of Nadia on November 11, 1938 and the plaint was filed on January 11, 1939. If in calculating the period of two months under section 80, Civil Procedure Code, the date on which the notice was served is to be excluded, the suit is admittedly premature and has been brought a day too soon; if on the other hand the date of service is to be included in the computation, the suit was quite in time. The learned Subordinate Judge is of opinion that the period of two months is to be reckoned inclusive of the date of notice and consequently the suit was not premature. The learned Advocates on both sides have referred us to a number of English cases on the point, though these decisions cannot be said to be by any means uniform.

The authority which directly supports the contention of the plaintiff is the pronouncement of the English Court in *Castle v. Burditt* (1) which was decided in 1790 A. D. There an action of trespass was brought against some excise officers who were alleged to have wrongfully seized certain goods of the plaintiff, purporting to act under the provision of 23 Geo. III, Ch. 70. It was necessary under the statute that one calendar month's notice should be given before an action was brought. The notice was given on the 28th of April and the writ was sued out on the 28th of the following month. The Court held on the authority of *Rex v. Adderley* (2) that the notice was sufficient, the day on which the notice was served being reckoned as included in the period of one month for which notice was required. In *Rex v. Adderley* (2), it should be noted, the question was whether the day on which the Sheriff's office expired should be included in the six months after which he could not be called upon to return processes under the provisions of the statute 20 Geo. II, 37, and it was held that it should be included, for the statute was made for the ease of Sheriffs. In *Glassington v. Rawlins* (3) which was decided in 1803 the Court held that the day on which a bankrupt was sent to prison should be included in counting the period of two months for which it is necessary that he should

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(1) (1790) 3 T. R. 623; 100 E. R. 768.

(2) (1780) 2 Doug. 463.

(3) (1803) 3 East 407; 102 E. R. 653.



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remain in prison for completing the act of bankruptcy. All these cases were referred to by Sir William Grant in *Lester v. Garland* (1). In that case the testator had bequeathed the residue of his estate upon trust, providing that in case his sister should, within six months next after the testator's death, give security not to marry a certain person, it would be paid to her, otherwise it would go to her children. The testator died on January 12, 1805 and the security was given by his sister on the 12th July following. It was held that the security was valid and the six months were to be taken exclusive of the day of the testator's death. It is quite true that Sir William Grant made it clear in his judgment that it was not necessary to lay down a general rule on the point as to whether in computing time from an act or event the day of the act is to be excluded or included; but at the same time the Master of the Rolls observed that it would be more convenient to hold that the day of an act done or event happening should be excluded than that it should be included. "Our law", so runs the judgment, "rejects fractions of a day more generally than the civil law does. The effect is to render the day a sort of indivisible point so that any act done in the compass of it is no more referable to any one than to any other portion of it; but the act and the day are co-extensive and the act cannot properly be said to have passed until the day is passed." The cases of *Rex v. Adderley* (2) and *Glassington v. Rawlins* (3) were undoubtedly decided on their own peculiar facts. The first of these decisions laid stress on the policy of the particular statute which was held to have been enacted for the ease of Sheriffs, while the other put a strict interpretation on the penal provisions of bankruptcy law and held that in counting the period of two months' imprisonment the day on which the debtor was sent to prison should be included. The decision in *Castle v. Burditt* (4) indeed rested on no particular facts of its own. But it proceeded entirely upon the earlier decision in *Rex v. Adderley* (2) without any discussion of the principle involved in such cases. Since the decision in *Lester v. Garland* (1) the trend of authorities in England has been to hold that when time for a particular period is allowed to a party to do an act, the first day is to be reckoned exclusively. Many of these cases were referred to by B. Parke in *Young v. Higgin* (5).

(1) (1808) 15 Ves. 248; 33 E. R. 748.

(2) (1780) 2 Doug. 461.

(3) (1803) 3 East. 407; 103 E. R. 653.

(4) (1790) 3 T. R. 623; 100 E. R. 768.

(5) (1840) 6 M. &amp; W. 50.

In this case an action was brought by the plaintiff against a Magistrate for issuing an illegal warrant under which his goods were seized and sold. Under statute 24 Geo. II C. 44, S. 1 it was necessary to serve one calendar month's notice on the Magistrate before the action was brought. The notice was served on the 26th March, 1883 and the writ was sued out on the 26th of April following. It was held that the action was brought too soon and should be dismissed. Alderson B. who delivered a separate judgment agreeing with B. Parke observed as follows :—

"Here is a case in which one party is required to give notice to another a certain time before a particular act can be done by the former; the party to whom the notice is given cannot fix the period of the day when it is to be given, but the Act of Parliament gives him one month as an intervening period within which he may deliberate whether he will do a certain act, namely, tender amends; and unless you exclude both the first and the last day, you do not give him a whole month for that purpose."

Amongst other cases applying the same principle reference may be made to *Blunt v. Heslop* (1) and *Browne v. Black* (2). The law is thus summed up in Halsbury's Laws of England, 2nd Edn. Vol. XXXII, P. 140

"When a period is fixed before the expiration of which an act may not be done, the person for whose benefit the delay is prescribed, has the benefit of the entire period and accordingly in computing it, the day from which it runs as well as the day on which it expires must be excluded."

We agree with Mr. Gupta that none of the cases quoted above can be regarded as direct authority in the matter of interpreting the provision of section 80 of the Civil Procedure Code. Whether the day on which notice is served under section 80, Civil Procedure Code is to be included or excluded for the purpose of computing the period of two months before the expiry of which no suit could be brought, as contemplated by the section, must have to be determined on the wording of the section itself and the obvious purpose which the Legislature had in view in enacting it. Section 80 lays down that no suit shall be instituted against the Crown or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been served in the parti-

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(1) (1838) 8 Ad. and El. 577.

(2) (1912) 1 K. B. 316.

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cular prescribed way on the Crown or the officer concerned. The object of the Legislature in requiring the notice is undoubtedly to afford the Crown or the public officer, as the case may be, an opportunity to reconsider the position and make amends or settle the claim if so advised. The defendant is allowed two months' time for deliberation and the suit cannot be brought until the expiry of two months next after notice has been served in the way indicated in the section. The word "next" means "immediately following or succeeding". Thus the period of time is to commence immediately after notice is delivered to or left at the office of the defendant. The notice has to be served at some hour of the day, be it early or late. If the intention of the Legislature is that the defendant should have full two months' time for the purpose of deliberating and deciding the steps that he might be advised to take, it is clear that he cannot have full two months' time if the hours of the day that remain after receipt of notice are not excluded for purposes of computation. If that day is to be included, he necessarily gets less than two months. A day should ordinarily be taken to mean the whole day and not a fraction of a day, and in these circumstances we think that the period of two months as laid down in section 80 Civil Procedure Code should be taken as exclusive of the day on which the notice is served. In this view the suit in the present case must be deemed to have been brought a day too soon. The terms of section 80, Civil Procedure Code, as has been held by the Judicial Committee (Vide *Bhagchand v. Secretary of State* (1) are imperative and admit of no exception or implication and non-compliance with its provisions is fatal to the plaintiff's suit.

Mr. Gupta has argued that the Government was not a necessary party to a suit of this description, and referred to section 104(H)(3), Bengal Tenancy Act which says that no suit shall be brought against the Crown unless the Crown is landlord or tenant. But here admittedly the Crown has taken possession of the touzi in consequence of the proprietors refusing to take settlement of the same. Whether the Province of Bengal holds it on behalf of the proprietors or in its own capacity as sovereign might be considered later on. But it cannot be denied that the rent in respect of the *putni* held by the plaintiff is now payable to the Province of Bengal who occupies the position of a landlord with regard to all subordinate interests under the touzi. A decree against the Dudhuria alone, who have not taken settlement of the Touzi for this period, will

not be of any benefit to the plaintiff nor would such a decree bind the Province of Bengal if it is dismissed out of this suit. In our opinion, therefore, the suit should be regarded as premature and unsustainable in *limine* for noncompliance with the provision of section 80 Civil Procedure Code.

In view of our decision on this point a discussion of the other point raised by Dr. Basak is, strictly speaking, not necessary. But as the point has been fully argued and there is a chance of the case going up to a higher tribunal, it is our duty to record our decision on all points raised in this appeal.

Dr. Basak's contention in substance is that though by a contract made before the passing of the Bengal Tenancy Act between the predecessors of defendants 2-5 and the plaintiff company, the rent of the *putni* tenure held by the plaintiff was fixed for ever, that contract might and would have been binding only if defendants Nos. 2-5 had taken settlement of the *touzi* for the present period of temporary settlement. As however the proprietors have refused settlement and the estate is under *khas* management of the Government by virtue of its powers under Regulation VII of 1822 and as the Government is in no sense a successor to or representative of the proprietors, the stipulation in the lease regarding the fixity of rent is not binding on the Government or on the settlement officer and the latter could settle the rents of all classes of tenants as he deemed proper irrespective of the terms of the *putni patta*. The point is not free from doubt as we shall presently explain, though it has come up for consideration in some form or other in quite a large number of cases before this Court. It is a matter of frequent occurrence in Bengal that, before any revenue settlement is made in respect of alluvial accretions to a permanently settled estate, the proprietor has granted a permanent *mokurari* lease of all lands in his possession including the *dsara* lands of which he is undoubtedly the proprietor but with regard to which the Government has the right to assess fresh revenue. When the *dsara* lands are resumed, the Government for revenue purposes can follow one or other of the course open to it under Act XXXI of 1858 and it can, as it has done in the present case, keep the accreted lands as a separate temporarily settled estate and make periodical settlements from time to time. As the proprietor of the parent estate is in law the proprietor of the accretions also, he has undoubtedly the first right to take settlement. But in case he refuses to accept, the Government has the right of making farming settlement or even

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a proprietary settlement with other persons, or it can keep the estate under its khas management; and in either case the recusant proprietor is entitled to an allowance which is called *maikana*.

In all districts to which the Bengal Tenancy Act is applicable, the operations for assessment or revision of land revenue in regard to non-permanently settled estates, are preceded by operations under Ch. X, Part II of the Bengal Tenancy Act, and the revenue officer who has got to settle the rents payable by all classes of tenants within the temporarily settled estate had to prepare a rent roll in respect of the same. The rental assets of the *touzi* being thus determined, the assessment of land revenue is made on the basis of the same. The object of the scheme undoubtedly is that it is only fair to the landlord that the rents payable to him by the subordinate tenants should be authoritatively settled and capable of being realised through courts of law before any revenue demand could be made on the basis of the same. And it would certainly be unfair if revenue were to be assessed on a certain percentage of assumed rental which the landlord might never realise. Section 104(A) and the subsequent sections of the Bengal Tenancy Act lay down the procedure that is to be followed by the revenue officer in the matter of settlement of rents and preparation of rent roll. It is open to the parties interested to intervene in the settlement proceedings under sections 104(E) and 104(G). A person aggrieved by the decision of a revenue officer may institute a suit in a civil court on any of the grounds mentioned in section 104(H)(3), Bengal Tenancy Act, and subject to all these provisions the rents settled become conclusive and final and are deemed to be fair and equitable rents under section 104(J), Bengal Tenancy Act.

Suppose, as in the case before us, the proprietor of certain *deans* lands had granted a *mokurari* lease of the same to a tenure holder fixing the rent perpetually for all time to come. The lands are later on formed into a temporarily settled estate and suppose that during a particular revenue settlement of the same the revenue officer in settling rents of all classes of tenants within its boundaries, under section 104, Bengal Tenancy Act fixes the rent of this tenure at a much higher figure than was reserved by the lease. Is it within the competence of the revenue officer to ignore the contract and settle the rent in violation of its terms, and if he does that what is the remedy of the tenant? One of the earliest pronouncements on this point is that of the Judicial Committee

in *Prionath Das v. Ram Taran Chatterjee* (1) and though it was a case where rents were settled by revenue officers prior to the passing of the Bengal Tenancy Act under the law as it then stood, the principle underlying this decision has been applied to a large number of cases since then where rents have been settled under the provisions of the Bengal Tenancy Act. In this case a *chak* forming part of a *gauti* tenure of which a *patta* was granted in 1867 by the zemindar, to the defendant at an annual rental of Rs. 2,300, was resumed by the Government and in 1884 was granted on a temporary settlement to the heirs of the zemindar. There was a clause in the *patta* that in case any portion of the land within it was resumed, the tenant would get proportionate abatement of rent. The plaintiff was a purchaser of the *chak* from one of the heirs of the zemindar who took settlement of the *chak* after resumption by the Government. He sued the defendant for rent not at the rate proportionate to that mentioned in the *patta* but on the basis of the rent settled by the revenue authorities under section 10 of the Act VIII of 1879. It was held by their Lordships of the Judicial Committee that the resumption by Government and settlement of rent by revenue authorities did not disturb the contractual rights of the parties so long as the proprietor himself or his successors were the holders of the *touzi*. "The settlement proceedings of 1884", so runs the judgment, "cannot be held to have abrogated the rights of that respondent under the *patta*, so long as the Raja Baroda Kant Roy and his heirs were themselves in a position to let him have the lands. In fact, the resumption by Government did not disturb the possession either of the Raja's heirs or of Chatterjee. \* \* \*

\* \* \* If it had seemed good to the Government to take the land into their own khas possession, or to settle it on strangers to the contract with the respondent Chatterjee, then the recorded rent would have been the rate of payment by the respondent." Thus the position was that if the proprietor who had granted the lease took settlement of the new *touzi*, the contractual rights prevailed but not otherwise. As said already, the rents in this case were settled under section 10\* of

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(1) (1903) 30 I. A. 159; I. L. R. 30 Calc. 811.

\*Section 10 of Bengal Act VIII of 1879 (an Act to limit and define the powers of Settlement Officers) is as follows:—

"Every under-tenant and raiyat shall be liable to pay the rent recorded as demandable from him under this Act unless it shall be proved in any suit

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Act VIII of 1879 and no such provision as that of section 191 of the present Bengal Tenancy Act was in existence at that time. Section 191 of the Bengal Tenancy Act as it stands after the amendment of 1928, is an amalgamation of sections 191 and 192 of the old Act and it provides *inter alia* that in case of lands situated in an estate not subject to permanent settlement when an assessment or revision of land revenue is made it would be open to the revenue officer notwithstanding anything in the contract between the parties entered into after the passing of the Bengal Tenancy Act to fix a fair and equitable rent for all grades of tenants in accordance with the principles laid down in the various sections of the Act. After the passing of the Bengal Tenancy Act the trend of decisions in this Court was to the effect that section 192 of the Act (which now forms a part of section 191) did not empower the revenue officer to fix a rent so as to affect contracts made before the passing of the Act. If the settlement officer had fixed rents in contravention of the terms of any such contract and if the grantor of the lease himself became the holder of the estate, he was not competent to recover rents in excess of what was reserved by the contract and the tenant could set up his contracted rights by way of defence to a suit instituted by such landlord for recovery of rents as settled by the revenue officer. It was further held that in such cases the tenant could take this defence in spite of the fact that no suit was brought by him challenging the entry of rent in the settlement rent roll, under section 104(H), Bengal Tenancy Act. There are a large number of decided authorities on this point and we may refer to some of

instituted by such under-tenant or raiyat to contest his liability to pay the same that such rent has not been assessed in accordance with the provisions of this Act."

"But nothing in clause (c) of section 7 of this Act or in this section shall be held to limit the discretion of the Court in determining in any suit under this section the rent of an under-tenant of the class described in the said clause (c)."

Section 7 clause (c). "If the Settlement Officer shall find that the tenure is not binding as against the Government, he shall first determine the proportionate amount of the demand of land revenue to be assessed upon the lands included in the tenure in accordance with any orders of Government for the time being in force regulating the demand of land revenue, and shall record the rent payable by such under-tenant at such a sum (not being less than such proportionate amount of land revenue or more than the aggregate of the rents recorded as payable to him from the subordinate under-tenants and raiyats whose holdings fall within his tenure) as may seem fair and equitable with reference to the character or circumstances of the tenure"—Ed.

them by way of illustration. The case of *Khirode Kanta Ray & Ors. v. Akhoy Kumar Chatterjee* (1) is one of the earliest of these cases and it related to the self-same *chak* which was the subject matter of litigation in *Prionath Das v. Ram Taran Chatterjee* (2). After the period of 20 years' settlement of that *chak* was over, the Government granted a farming settlement of the *chak* to the plaintiff Khirode Kanta Roy and others who were not the successors of the original proprietors and rents were settled under Chapter X Part II of the Bengal Tenancy Act which had been come into force. The plaintiff sued the defendant for recovery of the rent fixed by the revenue officer and the claim was allowed, it being held that the revenue officer had full jurisdiction to fix a fair and equitable rent. The contention of the defendant that an entry or omission in the record of rights could not override the contractual rights of the parties was overruled on the ground that the plaintiffs being strangers were not parties or privies to the original contract and the defendant could not claim any rights under the same. It is to be noticed that in this case the lease was prior to the Bengal Tenancy Act; yet it was held that the revenue officer was not bound to give effect to its terms and the decision obviously proceeded on the ground that the contract could be enforced only between those who were parties to it, no matter whatever rent was considered fair and equitable by the revenue officer.

In *Muktakeshi v. Srinath* (3) the plaintiff was proprietor to the extent of two thirds share of certain alluvial lands which were resumed by the Government in 1903 and settled with the plaintiffs alone. Prior to the resumption the plaintiff along with his co-sharers had granted a lease of these lands to the defendant on a fixed rental and the lease was dated 19th of February, 1884. On a suit by the plaintiff to recover from the defendant the rent which was fixed by the settlement authorities it was held that with regard to two thirds share the plaintiff was bound by the terms of the contract, that is to say, was entitled to realise rent only at the rate mentioned in the lease while with regard to the remaining one third share, he was in the position of a stranger and was hence entitled to recover rent at the rate fixed by the settlement authorities. Here also it will be seen that the contract was prior to the Bengal Tenancy Act and the learned

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(1) (1916) 33 I. C. 420.

(2) (1903) L. R. 30 I. A. 159; I. L. R. 30 Cal. 811.

(3) (1914) 19 C. L. J. 614.



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Judges did not say that section 192 of the Act prevented the settlement authorities from fixing rents in violation of the terms of the contract. In fact with regard to the one third share the plaintiff was held entitled to recover rent at the rate fixed by the revenue officer and it was only on the ground of privity of contract that he was deemed incapable of doing so with regard to the two third share.

The case of *Prafulla Nath Tagore v. Tweedie* (1) is the next case of importance to which reference may be necessary. Here the predecessors of the plaintiff had settled certain *asli* lands together with some lands which were later on found to be *deara* to the defendant at a fixed rent. The lease was in 1860 long before the Bengal Tenancy Act was passed. After resumption of the *deara* lands a temporary revenue settlement rent was settled in respect of the defendant's tenure under section 104, Bengal Tenancy Act, and the plaintiff instituted a suit for recovery of the rent thus fixed by the revenue officer. It was held that the plaintiff was bound by the contract and that under section 192 of the Bengal Tenancy Act the revenue officer was not authorized to fix a rent which affected the contract entered into before the passing of the Bengal Tenancy Act. Another important point was touched in the judgment of Chatterjea, J., namely whether this question of contractual rights could be raised after the settlement of rent became final under section 104 (J) Bengal Tenancy Act. Opinion was expressed that under section 104(J), Bengal Tenancy Act only the entry relating to rent settled was final and not the entries relating to other matters which apparently were taken to include contractual rights of this description. The last proposition was elaborately discussed and reiterated by a Division Bench of this Court in the case of *Sarada v. Prafulla* (2). In this case after rents were settled in respect of a tenancy under section 104 of the Bengal Tenancy Act the tenant did not move the revenue officer under sections 104 (E) or 104(G) or the Civil Court under section 104(H). There were a *patta* and a *kabuliyat* between the landlord and the tenant prior to the passing of the Bengal Tenancy Act in which there was a stipulation that subject to certain contingencies regarding increase of revenue by Government the rate of rent was to remain unaltered. It was held that in spite of the fact that the records became final under section 104(J) the landlord was not entitled to recover rent beyond

(1) (1921) 35 C. L. J. 14.

(2) (1937) 65 C. L. J. 583.

the stipulation in the *patta* and the *kabuliyat*. The learned Judges it appears, accepted the contention of the appellant that the recording of contractual rights under the *kabuliyat* was not an entry relating to rent to which alone irrebuttable presumption attached under section 104(J), Bengal Tenancy Act, in other words the *kabuliyat* rent might not be fair and equitable rent as contemplated in Part II, Ch. X, Bengal Tenancy Act, and under such circumstances the revenue officer was to fix the rent that he considered proper and mention the *kabuliyat* rent as only a special incidence of the tenure which would be enforceable only in the special circumstances if the grantor of the lease happened to accept revenue settlement for the particular period.

The very same view was taken by Nasim Ali and Henderson, JJ., in *Midnapore Zemindary Co. v Chandra Singh Dudhuria* (1). This case arose out of two rent suits filed by the Dudhuria Zemindars against the Midnapore Zemindary Co. for recovery of arrears of rent for two successive periods in respect of a *putni* which was created in favour of the Zemindary Company by the same document of 1866 to which the *putni* in the present suit owes its origin. These lands also being alluvial lands were formed into a separate non-permanently settled *touzi* and rents of all classes of tenants were settled under Part II Ch. X, Bengal Tenancy Act. The estate was temporarily settled with the Dudhuria Zemindars and they instituted the rent suits for recovery of rent as fixed by the settlement authorities. The defence was that as the lands were covered by the *putni* lease of 1866 which fixed a consolidated rental in respect of all lands included in it, the contract was binding between the parties and the defendant was not bound to pay any additional rent. It appears that in this case also the rent fixed by the revenue officer had become final under section 104(J), Bengal Tenancy Act, and the defendant did not bring a suit challenging the entry under section 104(H) of Act. The learned Judges of this Court held—and the decision was quite in agreement with existing authorities—that only the entry relating to the amount of rent fixed by the revenue officer became final under section 104 (J), Bengal Tenancy Act. The question whether the tenant was liable to pay the rent thus fixed, by reason of a previous contract between him and a holder of the estate, was not a matter for determination by the revenue officer who has no power to touch contractual rights acquired

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before the Act. A suit under section 104(H), Bengal Tenancy Act would be necessary if the tenant had any grievance in respect of the amount of rent fixed by the revenue officer. But if in spite of the rent fixed being fair and equitable he asserted that the landlord had no right to realise that rent by reason of the terms of a previous contract, no suit under section 104(H) Bengal Tenancy Act, was necessary and so far as that question was concerned, no conclusiveness attached to the entry of rent under section 104(J), Bengal Tenancy Act. The result was that the rent suits were dismissed. Against this decision there was an appeal taken to the Judicial Committee by the landlords plaintiffs and the appeal was allowed by their lordships of the Judicial Committee and the judgment of this Court was set aside (*Vide Chandra Singh Dudhuria v. Midnapore Zemindary Co.* (1). It is necessary to examine the judgment of their lordships carefully as it has definitely overruled the view taken by a long series of decisions of this Court. The material portion of the judgment bearing on this point runs as follows :

"The view of the learned judges of the High Court appears to have been that sections 104A to 104J dealt only with the amount of rent and did not authorise the settlement officer to deal with the question of liability, and, therefore, that the question of liability for rent was only affected by the—presumption of correctness given to entries in the record-of-rights by section 103B of the Act. In particular they held that the settlement officer, in settling the rent, was not entitled to "touch contractual right". Their Lordships are unable to agree ; in their view, either the Settlement Officer was merely fixing a fair and equitable rent in the ideal sense, regardless of the existing contractual rights, or it was his duty to consider and form a decision based on such contractual rights. A perusal of the grounds of appeal specified in section 104H affords complete conviction that the entry of rent settled in the Settlement Rent roll prepared under sections 104A to 104F included a decision as to liability to the payment of rent, and it will be remembered that rent is defined in section 3(13) as "whatever is lawfully payable or deliverable in money or kind". Their Lordships agree with the learned Judges of the High Court that the Settlement Officer is not entitled to disregard—or to alter—contractual rights, but, differing from the learned Judges they hold that the Officer is bound to regard them

and to give effect to his view of them. It follows that the defence now stated by the respondents would properly have formed the subject of a civil suit instituted under section 104H within the period thereby prescribed". (46 C. W. N. p.807).

The propositions of law enunciated by their Lordships may be summarised as follows :—

(1) It is not correct to say that the settlement officer acting under sections 104 to 104 (J) of the Bengal Tenancy Act can deal only with the amount of rent and not with the question of liability to pay rent and that entry in the final rent roll cannot touch contractual rights :

(2) In settling rent under section 104, Bengal Tenancy Act the revenue officer has got to fix rent not in an ideal sense regardless of contractual rights but it is his duty to consider and form a decision based on such contractual rights :

(3) The tenant if he wants to dispute his liability to pay the rent as fixed by the revenue officer has got to bring a suit under section 104(H) in respect of the entry of rent against the landlord, within the time allowed by law and if he omits to do that, the rent must be deemed to be correctly settled and it would not be open to the tenant to set up his contractual rights in a suit brought by the landlord for recovery of the settled rent :

(4) The revenue officer is not only not competent to disregard or alter contractual rights, but on the other hand is bound to regard them and give effect to his view of them.

The last proposition was undoubtedly laid down with reference to the facts of the case actually before their lordships. In this case the contract was prior to the passing of the Bengal Tenancy Act. Under section 191 of the Act the revenue officer in fixing rent is quite competent to disregard contractual obligations created subsequent to the passing of the Act, though undoubtedly he has got to consider an existing contract as a valuable piece of evidence in connection with the determination of fair and equitable rent. It cannot be imagined that their lordships overlooked the provision of section 191 of the Bengal Tenancy Act ; on the other hand it seems probable that a reference to that section was considered unnecessary as in the case before their lordships the contract was one to which section 191 Bengal Tenancy Act was not attracted. But still another difficulty remains. In the case before the Judicial Committee the Dudhurias who had taken settlement of the touzi were themselves the grantors of the *patti* tenure. But what would be the position if the settlement was

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made with a stranger? The difficulty is considerably enhanced by reason of this fact that usually settlement of land revenue is made after the record-of-rights are completed under Part II, Ch. X, Bengal Tenancy Act, and the records have become final under section 104(J) of that Act. It cannot be known to the tenant till after the settlement had become final whether the proprietor who had granted him a lease would accept the settlement or there would be a settlement with a stranger or the Government itself would keep the estate under khas management. Their Lordships have expressly held that the revenue officer had got to determine not merely the amount of rent but the question of liability as well, based on existing contractual rights. He is not permitted, as was held in earlier cases, to fix a rent which he considers to be fair and equitable, and mention the contractual liability of the tenant as a special incident of the tenancy which would be attracted only if the contracting parties themselves came to occupy the position of landlord and tenant during a particular period of settlement. As it may not be known, at least in the majority of cases at the time when the entry of rent in the settlement rent-roll became final under section 104 (J), Bengal Tenancy Act, whether the old proprietor or anybody else would accept settlement and as the remedy of the tenant or the aggrieved party is to institute a suit under section 104(H), Bengal Tenancy Act, before the records become final, obviously it is not possible for him at that state to proceed on any assumption that the settlement would be with the contracting party or with some other persons. The rent paid, therefore, must be the same rent irrespective of the question as to who ultimately takes the settlement and the revenue officer, as has been said already, must proceed on the basis of contractual rights. The conclusion, thus necessarily follows that except in cases where section 191, Bengal Tenancy Act applies and to which no reference was made in the judgment of their Lordships if there is a contract between the proprietor and the tenant which according to the revenue officer was subsisting at the time of settlement proceedings and which determines the rent in a particular way, the revenue officer is bound to give effect to his own views of the terms of this contract and fix the rent on the basis of the same, and it is immaterial whether the settlement is accepted by the proprietor himself or by a stranger. This view undoubtedly goes against the trend of previous decisions on this point. It should be noted however that the pronouncement in

*Prionath Das's* case (1) upon which all the subsequent cases purported to proceed was decided not under the provisions of Bengal Tenancy Act but under the law as it stood prior to it. Section 10 of Act VIII of 1879 did not contain the elaborate provisions that are now laid down in Part II, Ch. X of the Bengal Tenancy Act and there were no provisions in the old Act corresponding to those which are to be found now in sections 104(H) and 104(J) of the Bengal Tenancy Act. Anyway we are bound by the decision of the Judicial Committee and interpreting the judgment as best as we can, no other conclusion seems possible to us.

In this view of the case the second point urged by Dr. Basak is bound to fail. In the case before us the entry in the rent-roll has not yet become final under section 104(J) and the present suit is one commenced by the plaintiff under section 104(H) of the Bengal Tenancy Act. The company can, therefore, raise the question that the revenue officer ought to have proceeded on the basis of the contract which was entered into between the plaintiff and the previous proprietors long before the passing of the Bengal Tenancy Act. It has not been suggested by Dr. Basak that that contract is no longer subsisting or is not binding on the proprietors. No ambiguity in its terms has been pointed out and it is not contended that the rent reserved by it is enhancible and not fixed in perpetuity. Dr. Basak's only argument is that as the Government has taken khas possession of the touzi, the contractual rights of the parties must have ceased to exist. It is perfectly true that the Government is in no sense an agent of the Dudhurias, though it was so described in the settlement records, nor it has derived its title from the latter. It has taken possession in exercise of its own rights under the provisions of Regulation VII of 1822. But the position undoubtedly is that the Province of Bengal occupies the position of landlord with regard to all subsisting subordinate tenures under the estate. The Province of Bengal was certainly not a party to the *patti* lease of 1866. But if the settlement officer is bound to give effect to the terms of the lease that question becomes immaterial. We do appreciate that the Government revenue may suffer if the revenue officer is not given authority to fix the rent as he considers fair and proper, simply because it is no excess of what was fixed by a contract long before the passing of the Bengal Tenancy Act. But that is a matter which Legislature alone can deal with and

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it is a thing to be noted that when the Bengal Tenancy Act was amended in 1928, the Legislature did not think it proper to arm the revenue officer with authority to override pre-Act contracts between landlords and tenants.

The result, therefore, is that the appeal is allowed on the first point only and the decision of the Court below reversed. The plaintiff's suit should be considered premature and the plaint should be rejected on that ground.

We direct each party to bear his own costs in both the Courts.

Kills, J. :—I agree.

P. S. ; S. C.

*Appeal allowed.*

*Before Mr. Justice N. A. Khundkar and  
Mr. Justice C. C. Biswas.*

SATYANARAIN BANERJI, PANCHANAN DAS,  
JOINT RECEIVERS TO THE ESTATE OF  
MESSRS. SEDDON & Co.

v.

RAJA SREE SREE KALYANI PRASAD SINGH DEO  
BAHADUR AND OTHERS.\*

*Receiver, appointed under Civil Procedure Code (Act V of 1908) Order 40 rule 1, if necessary party to execution proceeding—Effect of non-joinder—Such receiver, if party to successive executions, when made party in one—Such receiver, if "party to suit" or "representative of party to suit" under section 47 of the Code, when made party in execution proceeding for first time—Application for execution by major decree-holders only—Limitation—Time, if prevented from running—Limitation Act, (Act IX of 1908) section 7—Civil Procedure Code, Order 21 rule 16, notice under—Provisions, if apply where both transferor and transferee join in application.*

\*Appeal from Original Order No. 240 of 1942 against the order of G. M. Chatterjee, Esq., Subordinate Judge of Zillah Burdwan, at Amansol, dated the 12th June, 1942, in Misc. Case No. 106 of 1941, (Mortgage Execution Case No. 156 of 1938.)

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The words "parties to the suit" or the words, "their representatives" in section 47 of the Code of Civil Procedure cannot be extended to include a receiver appointed under Order XL Rule I of the Code to take charge of property which is subsequently sold in execution of a decree suffered by the owner thereof.

Nor can it be said that the omission to make such a receiver a party to the execution proceedings which have led up to the sale renders those proceedings void.

A receiver in insolvency, appointed under the Provincial or Presidency Insolvency Act, stands on a different footing from a receiver under the Code of Civil Procedure.

Case-law reviewed.

Each execution is a distinct proceeding and there is no presumption of continued representation of parties in successive executions.

Where therefore a receiver in office was made party in execution proceeding he or the succeeding receivers, who were not in fact made party in subsequent execution proceeding, could not be regarded as "parties to the suit" within the meaning of section 47 of the Code of Civil Procedure.

Joinder of a receiver in execution proceedings does not make him a party to the suit within the meaning of section 47 of the Code of Civil Procedure.

According to section 7 of the Indian Limitation Act, where one of the decree-holders was still a minor, limitation for execution of decree by major decree-holders would not run against any of them till the minor attained majority inasmuch as the other decree-holders were not competent to give a valid discharge without their concurrence.

The provisions of Order 21 rule 16 of the Code of Civil Procedure applied only where application for execution was made by transferee of decree and not where the transferor and transferee both joined.

Where on an application for execution being presented, the Court ordered it to be registered as one by the decree-holders alone, and whether joint execution with the assignee would be allowed or not was left over to be considered after the judgment-debtor and the pro-forma decree-holder appeared, there was no occasion for the issue of notice under Order 21 rule 16 of the Code of Civil Procedure.

Where an application for execution is made after notice under Order 21 rule 22 and Order 21 rule 66 the judgment-debtor is debarred from taking an objection that the application was barred under section 48 of the Code of Civil Procedure.

Appeal on behalf of the Joint Receivers of the Estate of the Judgment-debtors.

Petition of objection under section 47 of the Code of Civil Procedure on behalf of the two joint receivers of the estate of the judgment-debtors.

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The material facts will appear from the judgment.

*Messrs. Bankim Chandra Mookerjee, Muktipada Chatterjee and  
Chandra Narain Laik* for the Appellants.*Messrs. Atul Chandra Gupta, Krishna Chandra Ghosh, Susil  
Chandra Sen and Rai Bahadur Sanat Kumar Chatterjee* for the  
Respondents.

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The judgments of the Court were as follows :—

**Biswas, J. :** This appeal arises out of certain proceedings in execution of a mortgage decree, and is directed against an order of the Subordinate Judge of Asansol, dated the 12th June, 1942, in *Miscellaneous Case No. 106 of 1941*, dismissing the appellants' objections to the sale held in execution of that decree. The mortgagors were two persons, S. H. Seddon and Rasaraj Biswas, who carried on business in co-partnership under the name and style of S. H. Seddon and Co., but they are not the appellants before us. The appellants are two joint Receivers of the said partnership business the assets of which included the mortgaged properties, having been appointed as such in a suit on the Original Side of this court for dissolution of the partnership.

The objections raised to the sale were partly under Order 21, rule 90, and partly under section 47, of the Code of Civil Procedure. In so far as they fell under the first category, the learned judge held that they were time-barred, and also that the appellants had failed to substantiate them, while as regards the other objections, he held *inter alia* that the appellants had no *locus standi* to maintain the same, as they were neither parties to the suit nor their representatives within the meaning of section 47 of the Code. In the result, he dismissed the objections in their entirety.

The material facts of the case may be shortly stated. On the 31st March, 1921, the mortgagors above named, S. H. Seddon and Rasaraj Biswas, executed a mortgage in favour of Mugniram Bangur and Kedar Nath Daga for a sum of Rupees 10 lakhs in respect of their 14 annas interest in certain coal lands in the districts of Manbhum and Burdwan, stipulating to pay interest at the rate of 7 per cent per annum with six-monthly rests. By an indenture of the same date they also assigned their remaining 2 annas interest in the properties to the mortgagees. On the 4th September, 1922, the mortgagees instituted a suit in the court of the Subordinate Judge of Asansol to enforce the mortgage, and

also for a declaration of their title to the 2 annas share which had been assigned to them.

On the 3rd July, 1923, a preliminary decree was passed in the suit for a sum of Rs. 10,64,296-3-0 including interests and costs, on the basis of a compromise, one of the terms of which was that the name of the second defendant Rasaraj Biswas should be expunged from the record and the suit dismissed against him. As a result, the decree was made only against the other defendant, S. H. Seddon. The plaintiffs' title to the 2 annas share was also declared as claimed.

Meanwhile, it appears that on the 24th March, 1923, while the mortgage suit was pending, one Sasthi Kinkar Banerjee instituted a suit on the Original Side of the High Court (*Suit No. 908 of 1923*), claiming a 4 annas share in the partnership business of S. H. Seddon and Co., and praying for a dissolution of the partnership and for accounts. On April 10, 1923, a decree was made in the suit, also on compromise, by which the partnership was dissolved and accounts were ordered to be taken on the footing that Sasthi Kinkar Banerjee was entitled to the 4 annas share as claimed.

By the decree certain persons were appointed joint Receivers of the partnership assets, which, as already stated, included the properties covered by the mortgage in favour of Mugniram Bangur and Kedar Nath Daga. The joint Receivers were these two mortgagees, besides one Satis Chandra Sen, a Solicitor of this Court, and two other persons, but it does not appear that the appointment of the mortgagees was made with their knowledge or consent. By a subsequent order made on the 13th June, 1923, the joint Receivers were in fact discharged, and in their place the said Satis Chandra Sen was appointed sole Receiver with the same powers and subject to the same conditions.

At the date of the preliminary decree in the mortgage suit, Satis Chandra Sen was accordingly in possession of the mortgaged properties as such sole Receiver, but he was not made a party to the decree.

In the compromise petition which formed part of the decree there was a provision that within a period of six months from the date thereof a new Receiver should be appointed in the person of one F. M. Leslie upon discharge of the Receiver appointed in Suit No. 908 of 1923, and if this was done, the plaintiffs agreed not to put the decree into execution for three years, and the new Receiver was to liquidate the decretal amount within that period.

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On this basis the date of redemption was fixed in the decree as the 2nd July, 1926. There was, however, a clause in the terms of compromise that in case Leslie was not appointed Receiver, the plaintiffs would be at liberty to take out execution without waiting for three years.

No steps were taken by Seddon to get Leslie appointed, or otherwise comply with the conditions for liquidation of the mortgage debt. The decree-holders accordingly applied for a final decree for sale on the 7th March, 1925, and notwithstanding Seddon's objection that the application was premature, the Court passed a final decree on the 18th April, 1925 (*Exhibit 9*). The second plaintiff Kedar Nath Daga having died, his two minor sons, Jewan Lal Daga and Satya Narayan Daga, had been substituted as decree-holders in his place.

It appears that before the final decree was passed, Sasthi Kinkar Banerjee, who had in the meantime been adjudicated an insolvent, applied for leave to intervene in the mortgage suits, and he also prayed that failing him, the Receiver of his estate should be added as a party. Both the prayers were rejected on the 19th November, 1934 (*Exhibit E*).

On the 10th February, 1930, the first application was made for execution of the final decree (*in Mortgage Execution Case No. 38 of 1930*). The application was filed only by the two minor decree-holders under order 21, rule 15 of the Code of Civil Procedure, making the other decree-holder, Mugniram Bangur, a pro-forma opposite party, and it was directed not only against the two original defendants, S. H. Seddon and Rasaraj Biswas, but also against the Receiver Satish Chandra Sen, who was added as a party with the leave of the High Court previously obtained on the 14th January, 1930, in Suit No. 908 of 1930 (*Exhibit 11*).

Both Seddon and Satish Chandra Sen filed objections, and their main contention was that the application was barred by limitation, not having been made within three years from the date of the final decree, the 18th April, 1925.

By his order dated the 3rd February, 1931, the learned Subordinate Judge dismissed the objections, holding that as the adult decree-holder could not give a valid discharge without the concurrence of the two minor sons of Kedar Nath Daga, limitation was saved under the provisions of section 7 of the Indian Limitation Act. Two Appeals were taken to the High Court (*F. M. A. Nos. 251 and 252 of 1931*), one by Seddon and the other by the Receiver, but they were both dismissed on the same ground on the 3rd March,

1933 (*Exhibit 1*). During the pendency of the appeals, however, the decree-holders had suffered the execution case to be dismissed for non-prosecution, without satisfaction, on the 7th September, 1931 (*Exhibit 8*).

No further steps appear to have been taken under the decree till the year 1938, but on the 12th of April, that year the decree-holders executed a registered deed of transfer in favour of Raja Jyoti Prasad Singh Deo of Panchkote (*Exhibit K*) by which they assigned to him all their right, title and interest in the properties which they had obtained under the decree as well as the decree itself with express power to the transferee to execute the decree "at his option but without recourse to the transferors", the transferors on their part binding themselves to file any petition that might be required of them in order to entitle the transferee to carry out the execution. Of the two sons of Kedar Nath Daga, Jewan Lal Daga, joined in the transfer merely as a confirming party, as he had no longer any interest in the properties assigned, having been previously taken in adoption in another family.

Then followed on the 2nd July, 1938, the next application for execution (*in Mortgage Execution Case No. 156 of 1938*), out of which the present appeal has arisen. It was more than 12 years from the 18th April, 1925, the date on which the final decree had been passed, but within 12 years from the 2nd July, 1926, which was the date fixed for payment of the decretal amount under the preliminary decree. The application was made only by one son of Kedar Nath Daga, Satya Narain Daga, and the other decree-holder, Mugniram Bungar, jointly with the said assignee of the decree, Raja Jyoti Prasad Singh Deo, Jewan Lal Daga being joined as a party pro-forma. The principal opposite parties were S. H. Seddon and the heirs of the other judgment-debtor mentioned in the decree, Rasaraj Biswas, who appears to have died already,

As stated above, the Receiver Satish Chandra Sen had been made a party to the previous execution case (*No. 38 of 1930*), but the decree-holders did not join him as party in the present proceeding. On the 8th August, 1939, the present appellants were appointed Receivers in the place of Satish Chandra Sen, but they also were not added as parties at any subsequent stage.

The record shows that S. H. Seddon entered appearance through a pleader, and on the 1st December, 1938, made an application asking for one week's time to file objections to the execution. Time was allowed till the 7th December following, but ultimately no objections were filed on his behalf.

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On the 2nd July, 1939, however, certain objections filed by one Saradindu Nivanani, claiming to be a representative of the judgment-debtors on the allegation that on the 20th September, 1937, she had purchased the 4 annas share of Sasthi Kinkar Banerjee in the partnership business of S. H. Seddon & Co., at a public sale held by the Receiver in his insolvency. The objections were not only directed against the execution but attacked the decree itself. The learned Subordinate Judge rejected her application and the order was afterwards upheld in appeal by this Court on the 8th July, 1941, in *E. M. A. T. No. 1236 of 1939 (Exhibit N)*, on the ground that it had not been shown that Sasthi Kinkar Banerjee had acquired any interest in the mortgaged properties or that Saradindu Nivanani had any *locus standi* under section 47 of the Code of Civil Procedure.

Thereafter, on the 5th June, 1939, the mortgage sale was held, when 14 items of properties were purchased by Raja Kalyani Prasad Singh Deo, who, as eldest son of the assignee decree-holder, had in the meantime, upon his death, succeeded to the Panchkote Raj under the law of primogeniture which governed the family.

Two petitions were then filed for setting aside the sale, one on the 30th June, 1939, by Saradindu Nivanani, and the other on the 28th July, 1941, by the two Receivers in Suit No. 908 of 1923, the appellants in this appeal. The first was within 30 days from the date of sale, but the second was long after that date.

Both applications were heard together and dismissed by the Subordinate Judge by the same judgment on the 12th June, 1942. We are not concerned in this appeal with Saradindu Nivanani's case, but only with that of the joint Receivers.

As already stated, the application of the Receivers was not limited to challenging the sale on the ground of fraud and material irregularity in publishing or conducting it under order 21, rule 90 of the Code of Civil Procedure, but covered grounds which fell within section 47 of the Code. The grounds are set out in the petition and will be found printed at pp. 43-44 of the paper-book.

In so far as the objections were under order 21, rule 90 of the Code, they need not detain us long. As the Court below pointed out, they were filed long out of time, and were clearly barred under article 166 of schedule I of the Indian Limitation Act, the appellants not having made any case under section 18 of having been kept out of knowledge of the sale by means of fraud. On the merits also, the learned Judge held that the appellants had failed to establish fraud or material irregularity, or any substantial injury

by reason of fraud or material irregularity. Before us, Mr. Bankim Chandra Mookerjee on behalf of the appellants did not in fact think it fit to challenge the decision on this part of the case.

The learned advocate confined himself in the appeal to the objections under section 47 of the Code, and these he summarised as follows :—

(i) That the Receiver was a necessary party to the execution proceeding, and in so far as he had not been made a party, the proceeding was wholly void.

(ii) That the application for execution having been made more than 12 years from the date of the final decree, it was barred under section 48 of the Code.

(iii) That the application was also barred under article 182 of schedule 1 of the Indian Limitation Act.

(iv) That no notice had been served on the judgment-debtor under Order 21, rule 16 of the Code, and the proceeding was accordingly null and void.

(v) That there was no express order of the court allowing the assignee of the decree to proceed with the execution, and this also rendered the proceeding bad in law.

It was further contended that the court was wrong in holding that the appellants have no *locus standi* to maintain the objections under section 47.

It may be mentioned that before filing their petition of objections the joint Receivers had duly obtained the leave of this court in its original jurisdiction in Suit No. 908 of 1923 (*Exhibit 13*).

The objections were all over-ruled, except that on question of limitation under section 48 of the Code of Civil Procedure, the court agreed that the period of 12 years under the section should be reckoned from the date on which the final decree had been passed, namely, the 18th April, 1925, and not from the 2nd July, 1926, which had been fixed as the date for payment under the preliminary decree, though the learned Judge held that limitation was saved by reason of the order for execution which had been passed after due notice to the judgment-debtor under Order 21, rule 22 and rule 66 of the Code.

Mr. Mookerjee recognised that the preliminary difficulty in his clients' way was the bar of section 47, and this was in fact the primary question which the learned judge was called upon to consider. It was not disputed that the section applies only between "parties to the suit in which the decree was passed, or their repre-

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representatives", and the question was whether the appellants could bring themselves within either of these categories.

Admittedly, neither Satish Chandra Sen, who was the Receiver in office at the date the present execution was started, nor his successors, the present appellants, who came into office on the 8th August, 1939, had been impleaded as a party or parties to the mortgage suit. They were also in fact not parties to the present execution proceeding, though Satish Chandra Sen had been added as a party in the previous execution case (Mortgage Execution Case No. 38 of 1930), which was dismissed for non-prosecution on the 7th September, 1931.

It was nevertheless Mr. Mookerjee's contention, relying on the last mentioned fact, that Satish Chandra Sen, and necessarily therefore, the succeeding Receivers, should be regarded as "parties to the suit" within the meaning of section 47. The argument involved a double fiction. The first was that as Satish Chandra Sen was a party to the execution case of 1930, he must be deemed to have been equally a party to the next, and the second was that if he was a party to the execution proceeding, he thereby became a party also to the suit, as a suit continued till the termination of the execution proceeding.

In our opinion, none of these propositions can be supported. As regards the first, it is sufficient to state that there is neither principle nor authority for holding that if a person is made a party to an execution proceeding, and particularly, if that proceeding is finally disposed of as was the case here, by an order of dismissal, he must be taken to be a party to every subsequent execution that may be levied, whether he is in fact joined as a party or not. Each execution case is a distinct proceeding, and there is no presumption of continued representation of parties in successive executions.

In this case, under the leave obtained from the Original side of this court in Suit No. 908 of 1923, the decree-holders were given liberty to add the Receivers as a party to the execution proceedings, but this only meant that they would not be required to apply for and obtain leave to join the Receiver as a party every time they took out execution against the properties in his hands. It did not mean that if the Receiver was added as a party once, it would not be necessary to make him a party in any subsequent proceeding.

If, then in point of fact, rightly or wrongly, the Receiver was not a party to the later execution which was started on the 2nd

July, 1938, it is not possible to say that he was still a party to it, merely because he had been added as a party to the previous proceeding of 1930, which, as already stated, was afterwards dismissed for default.

It is needless to add that the present appellants as succeeding Receivers could not in this respect claim to be in a better position than Satish Chandra Sen.

The first branch of the appellants' contention thus failing, the second does not arise, but even supposing that Satish Chandra Sen as Receiver had been made a party to the execution case of 1938, it did not follow that he could, therefore, claim to be regarded as a "party to the suit" for the purpose of raising objections under section 47 of the Code. Whether the Receiver could be said to be a "representative" of a party to the suit, is another question which will be considered separately.

Mr. Mookerjee, on behalf of the appellants, was unable to cite any authority in support of his contention, which was certainly not assisted merely by saying that execution proceedings were a continuation of the suit. Our attention was neither invited, on the other hand, to any direct authority to the contrary.

Mr. Atul Chandra Gupta for the respondents, however, relied on the Allahabad case, *Angan Lal v. Gudar Lal* (1) which appears to lend indirect support to the contrary view.

In that case, a person held a money decree, and upon the death of the original judgment-debtor, took out execution against a number of persons as the latter's heirs and legal representatives, including a brother of the deceased. The brother objected that he was not an heir or legal representative, and execution could not consequently proceed against him. The learned Judge who tried the execution case, however, held that the brother had received some money which was due to the estate of the deceased judgment-debtor, and misappropriated the amount himself, and on that basis, made an order for execution against him. The brother then brought a suit to set aside this order, and the question arose whether the suit was barred under section 244 of the Code of Civil Procedure then in force, which corresponded to section 47 of the present Code. It was held that the suit was maintainable.

It was rightly pointed out by Mr. Gupta that the decision could be justified only on the basis that the plaintiff was neither a party to the suit nor a representative of a party to the suit within the

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meaning of section 244. The fact that he was a party to the execution was obviously not deemed sufficient to bring him within any of these categories.

The broad proposition for which Mr. Mookerjee contended on this branch of his argument must consequently be over-ruled and that brings us to the next question :

Could the joint Receivers be regarded as "representatives" of the original parties to the suit ?

The Receivers had been appointed in Suit No. 908 of 1923, to which none of the decree-holders were parties. There could, therefore, be no question of their being representatives of the decree-holders. Were they, then, representatives of the judgment-debtors ?

In *Ajodhya Roy v. Hardwar Roy* (1), Mookerjee, J. laid down two tests in order to determine whether a particular person is a representative of a party to the suit. They are :

"*first* whether any portion of the interest of the decree-holder or of the judgment-debtor, which was originally vested in one of the parties to the suit, has, by act of parties or by operation of law, vested in the person who is sought to be treated as a representative, and *secondly*, if there has been a devolution of interest, whether, so far as such interest is concerned, that person is bound by the decree".

Clearly, the Receivers here did not satisfy any of these tests. They were Receivers appointed under Order 40, rule 1 of the Code of Civil Procedure, and it is hardly necessary to cite any authority to show that the appointment of such a Receiver, though it might operate to change possession, could not effect the title to the property, which remained in those in whom it was vested when the appointment was made. This is indeed sufficiently clear from some of the decisions on which Mr. Mookerjee himself relied, and to which reference has been made by my learned brother, Khundkar, J. in his judgment: *Harihar Mukerji v. Harendra Nath Mukerji* (2) and *Dwijendra v. Joges* (3). Put shortly, the object of the appointment is not to divest a rightful owner of the title, but only to protect the property by taking possession (*Beach*, 209 and 221).

It could not be said, therefore, that the interest of the judgment-debtors any more than that of the decree-holders in any

(1) (1909) 9 C. L. J. 485.

(2) (1910) I. L. R. 37 Cal. 754, (757 to 758).

(3) (1923) 39 C. L. J. 40 (57).

of the properties was vested in the joint Receivers here upon their appointment, or that there was any devolution of interest in their favour.

A Receiver in Insolvency, appointed under the Provincial or Presidency Insolvency Act, stands on a different footing from a Receiver under the Code of Civil Procedure, as under the statute the insolvent estate vests in the former for the benefit of creditors. But even in respect of such a Receiver, Rankin, C. J. pointed out in *Mohitosh Dutta v. Rai Satish Chandra Chaudhuri Bahadur* (1) that any general statement to the effect that he was or was not a representative for the purposes of section 47 was necessarily misleading, as it all depended on the purpose and nature of the application made by the Receiver. The soundness of this view is not at all weakened by the decision of Guha and Bartley, JJ. in *Dinesh Chandra Ray Chaudhuri v. Jahanali Biswas* (2).

The contention that the appellants are representatives of any of the parties to the suit must, therefore, also fail, and the objections under section 47 of the Code of Civil Procedure should consequently be rejected as not maintainable.

This should be sufficient to dispose of the appeal, but we may add that the objections themselves as they stand are without any substance. But before dealing with them, we may dispose of an alternative argument which Mr. Mookerjee put forward on the question of *locus standi*. It was to the effect that we might treat the petition which his clients had presented to the court below not as a petition of objections under section 47 of the Code, but merely as an application to be added as parties to the execution case on the ground that they were necessary parties to the proceeding, and that in their absence no valid execution could be had. On this basis we were invited to interfere with the order of the learned Subordinate Judge under section 115 of the Code of Civil Procedure, converting the memorandum of appeal into an application in revision.

We may say at once that we see no reason for acceding to the prayer, but even if we did, it would be of no assistance to the appellants. It would merely have the effect of bringing the joint Receivers upon the record of the execution case, without giving them the *locus standi*, which they would still have to establish, to raise any objections under section 47.

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(1) (1931) 35 C. W. N. 971.

(2) (1934) I. L. R. 62 Cal. 457; 35 C. W. N. 424.

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We may also mention here that with a view to save the appeal, Mr. Mookerjee, on the last date of hearing, presented before us a petition of objections purporting to be on behalf of the judgment-debtor Seddon, under a power executed in favour of the learned advocate by a person claiming to hold a power of attorney from Seddon dated the 12th May, 1939.

We have no hesitation in rejecting the petition. In the first place, it was filed more than three years from the date of the sale, and was consequently barred under the residuary article 181 of schedule I of the Limitation Act. Secondly, as we have seen, Seddon had notice of the last application for execution, and actually entered appearance, and applied for time to file objections, which, however, he never did. We see no reason in these circumstances to entertain the present application, which in our opinion is not at all *bona fide*.

Turning now to the objections under section 47 of the Code, as already set out under five heads, objection (i) was the one which was most strenuously pressed by Mr. Mookerjee. It was urged that a Receiver was a necessary party to any execution levied against properties of which he was in possession, and that omission to make him a party rendered the proceeding null and void.

Quite a large number of cases were cited by Mr. Mookerjee in support of his contention, but it is sufficient to state that none of the decisions go the length of holding that if the Receiver is not added as a party, the whole of the execution would be *ab initio* void. The cases have been fully discussed by my learned brother Khundkar, J., and I need only say that I respectfully adopt his conclusion on the point. The first objection must accordingly be over-ruled.

As regards objection (ii) to the effect that the execution was barred under section 48 of the Code of Civil Procedure, the learned Subordinate Judge, as already stated, accepted the appellants' contention, but held that as an order for execution had been made after due notice to the judgment-debtor under Order 21, rules 22 and 66 of the Code, no objection was open any further on the ground of limitation.

In answer, Mr. Mookerjee cited a Full Bench decision of the Allahabad High Court in *Genda Lal v. Hasari Lal* (1), to show that such an objection could be taken even after an order had been made for execution with notice to the judgment-debtor.

(1) (1935) L. L. R. 58 All. 313.

In this case the Full Bench laid down a series of propositions to illustrate the application of the principle of constructive *res judicata* or estoppel by judgment to execution proceedings, and it was ruled *inter alia* that where the judgment-debtor appeared, but took no objection to the execution, he would not be debarred from raising the question of limitation at a later stage, only if the application for execution did not become fructuous at all: he would, however, be so debarred, if the application became fructuous in whole or in part, and such fructification necessarily involved the assumption that the application had been made within limitation.

We are not really called upon to consider the application of this ruling to a case like the present, where the question is raised by or against a person who is neither the judgment-debtor nor a person claiming through him, but a stranger to the decree. Apart from that, upon the facts of the case, we do not think it possible to say that the application for execution had not become fructuous. It is quite true that so far as Seddón was concerned, he took time, but did not file any objections, but as we have seen, objections were raised by Saradindu Nivani, and these were dismissed after adjudication, and it was thereafter that the sale was held.

Mr. Mookerjee relied on another Allahabad case, *Collector of Benares v. Jai Narain Rai* (1), which went to show that even if an execution sale had taken place, but the sale had not been confirmed, the execution would be deemed to remain infructuous within the meaning of the Full Bench ruling. Whether this is a correct view or not, the facts here, as already explained, are wholly distinguishable.

We must consequently also over-rule the second objection.

The next objection was that the application for execution was barred under article 182 of schedule I of the Limitation Act, inasmuch as it had been filed on the 2nd July, 1938, which was more than three years from the date of the final order passed on the previous application (7th September, 1931). We agree with the learned Subordinate Judge that the objection is fully met by the provisions of section 7 of the Limitation Act. One of the decree-holders, Satya Narayan Daga was still a minor, and the other decree-holders were not competent to give a valid discharge without his concurrence. Time would not, therefore, run against any of them till the minor attained majority. This was in fact the

(1) (1938) A. I. R. All. 89.

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ground on which a similar objection by Satis Chandra Sen as well as by Seddon had been rejected by this court in the previous execution case (*Exhibit 1*).

Objection (iv) related to non-service of notice on the judgment-debtor under Order 21, rule 16 of the Code, but this, in our opinion, was not a case coming under that rule. The rule applied only where application for execution was made by the transferee of a decree, and not where the transferor and transferee both joined. As the order-sheet in the present execution case will show, the application here was by Satya Narayan Daga, one of the sons of Kedar Nath Daga, and Mugniram Bangur, the other son of Kedar Nath Daga being added as a pro-forma party, and Raja Jyoti Prasad Singh Deo merely joined as assignee from the original decree-holders, without praying to be substituted in their place (vide order No. 1 dated the 16th September, 1938). As to whether after the assignment, the original decree-holders were entitled to maintain the application, was a different question which the present appellants do not appear to have raised in the court below, but it would be sufficiently met by the terms of the deed of assignment (*Exhibit K*) reported to in an earlier portion of the judgment. It is to be noted that on the application being presented, the court ordered it to be registered as one by the decree-holders alone, and the question whether joint execution with the assignee would be allowed or not was left over to be considered after the judgment-debtor and the pro forma decree-holder appeared. In these circumstances, there was no occasion for the issue of any notice under Order 21, rule 16 and this particular objection must, therefore, also fail.

The last point taken was that there was no express order made by the court directing execution by the assignee decree-holder. As already stated, the question as to his right to proceed with the execution singly or jointly was left over to be considered later after Seddon and Jewan Lal Daga appeared. None of them, however, appeared or filed any objections on the due date. Meantime, it appears the original assignee Raja Jyoti Prasad Singh Deo had died, and his eldest son Raja Kalyani Prasad Singh Deo applied for being substituted in his place. No notice of the application for substitution was directed to be served on the judgment-debtor, but the court made the order for substitution at once, and ordered intimation of the fact to be given to the judgment-debtor by registered post. Notices were thereafter

ordered to be issued in the usual course under Order 21, rule 66, to which also there was no response from the judgment-debtor. We think that in the circumstances the order for substitution might be taken to involve a determination of the assignee's right to execute the decree jointly with the original decree-holders. The last objection must consequently be also over-ruled.

The result is that on the merits as well as on the preliminary point the objections raised by the appellants to the present execution fail, and the appeal must accordingly be dismissed with costs. We assess the hearing fee at 10 gold mohurs.

**Khundkar, J.** :—I agree, but desire to say something about the cases which have been cited for and against the main argument.

This is an appeal by receivers whose objection under section 47 of the Civil Procedure Code to the execution of a decree and whose prayer under Order XXI, rule 90 of the Code for setting aside the execution sale were disallowed. One of the objections under section 47 was that the execution of the decree was barred under section 48 of the Code and under Article 182 of the Indian Limitation Act. The prayer to set aside the sale was on the ground of irregularity and fraud in publishing and conducting the same. The receivers were not parties to the suit, but after the final mortgage decree was pronounced leave was obtained by the decree-holders from the Court which appointed the original receivers to add the then receiver as a party to proceedings for the execution of that decree. It should be further noted that the then receiver was not made a party to the later execution case out of which the present appeal has in fact arisen, nor were the appellants who are the succeeding receivers made parties at any later stage. So far as the prayer under Order XXI, rule 90 to set aside the mortgage sale is concerned, the present receivers appellants may have *locus standi* to maintain it, because although neither they nor their predecessor were parties to the suit or to the execution proceedings which led up to the sale, they are nevertheless parties whose interest was affected by the sale. But that application itself, as found, is time-barred. It is, however, urged that, notwithstanding this, the sale should be set aside, because the execution proceedings in which it was held were void *ab initio*. This contention which amounts to an objection under section 47, is founded on the argument that the receivers were necessary parties to the execution proceedings and without them those proceedings are a nullity.

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As regards the objection under section 47, it is difficult to understand how the receivers appellants had *locus standi* to take any such objection, seeing that they were not parties to the suit which resulted in the decree, the execution of which is objected to. Here again, the contention is that they were parties whose presence in the suit was so necessary that they cannot now be debarred from taking objections under section 47, even though they do not technically answer the description of "parties to the suit" which that section contains. Consistently with this it is also urged that, if they are not actually parties to the suit, they fall, at any rate, within the meaning of the words "or their representatives" in section 77. It is further contended that they are in fact parties to the execution proceedings, because leave was granted to the decree-holders on the 14th of January, 1940, by the Court which appointed the original receivers to proceed against the then receiver in execution, and he was made a party to Execution Case No. 38 of 1930 which was commenced on the 10th of February, 1930. This last contention must be rejected at once. Execution Case No. 38 of 1930 was dismissed for default on the 7th of September, 1931, and in the present Execution Case No. 156 of 1938, which was started on the 2nd of July 1938, the receivers who are the appellants here were not made parties. It is idle to say that if a receiver is made a party to an execution proceeding which is then disposed of by dismissal, he or his successors in the office of receiver become by operation of law parties to every subsequent execution, even though the decree-holder does not seek to levy the same against him or them.

It is thus that the maintainability of the objection under section 47, which really include the argument that the execution proceedings were void *ab initio* owing to defect of parties, rests upon the contention that the receivers were either representatives of a party to the suit, or themselves in the position of parties, though they were not impleaded.

A number of cases have been cited on behalf of the appellant from which, it is said, one must extract the conclusion that a receiver appointed by a Court is so indispensable to the proper constitution of any proceedings respecting property of which he has been placed in charge, that to leave him out goes to the root of those proceedings. A careful examination of the decision cited and of certain passages therein which have been relied upon is required in order to exhibit the true principles stated, and to appreciate the limits to which they extend.

*Jagat Tarini Dasi v. Naba Gopal Chaki* (1). In this case the question raised was whether a suit for arrears of rent of a taluq could be brought by a receiver of the same suing in his own name. In answering this question in the affirmative it was observed as follows :—

"Now section 503 (O. XL. r 1 of the present Code) authorises the Court to grant to the receiver all such powers as to bringing and defending suits as the owner himself has. When an appointment has been made under that section and full powers granted to the receiver, we are disposed to agree with Mr. Justice Peter O'Kinealy in the view taken by him in *William Robert Fink v. Moharaj Bahadur Singh* (2), that power is conferred upon the receiver to bring and maintain suits in his own name, always supposing that the ownership of the property is completely represented in the suit in which the receiver is appointed.

This case has little or no application, because the question with which we are concerned in the present case is not whether a receiver can sue or be sued in his own name, and the proposition that he can does not advance the argument that a receiver is not only a necessary, but an indispensable party to any suit in respect of property in his possession as receiver.

*Mrs. Levina Ashton v. Madhabmoni Dasi* (3). In this case the holders of a money decree applied for execution by sale of a foreclosure decree obtained by their judgment-debtors and had that decree sold. Prior to the application for execution a receiver had been appointed of properties which included the property embraced by the foreclosure decree. The receiver had been appointed in another proceeding but to the knowledge of the applicants. The sale of the foreclosure decree in execution of the money decree was set aside upon the principle "that property in the hands of a receiver, though subject to a paramount judgment, cannot be sold under execution without leave of Court. A purchaser of such property at an execution sale buys at his peril and the sale may be cancelled upon an appropriate application to the execution Court."

The question whether the receiver, not being a party to the suit in which the money decree was obtained, had *locus standi* to main-

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(1) (1907) I. L. R. 34 Cal. 305 ; 5 C. L. J.

(2) (1898) I. L. R. 25 Cal. 642.

(3) (1909-10) 14 C. W. N. 560.



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tain an objection to the execution of that decree was not raised. Apparently, the application to reverse the sale was under a provision of the Code which corresponded to Order XXI, Rule 90 of the present Code, and in any event one of the judgment-debtors was a party to that application. This case lays down the proposition that the sale could be avoided at the instance of the receiver, and not that the execution proceedings were void *ab initio* because the receiver was not made a party thereto.

Mrs. Levina Ashton's case was followed in the case of *Sarat Chandra Banerjee v. Apurba Krishna Roy* (1) in which the material facts were as follows :—In execution of a decree against a judgment-debtor and a receiver appointed by the Court, certain properties were sold. Another judgment-debtor having applied for rateable distribution under section 73 of the Code (old), the objection of the receiver to the application on the ground that leave had not been obtained from the Court which appointed him, was upheld, and it was stated that Courts are generally reluctant to allow execution to proceed against the properties in the hands of a receiver until leave has been expressly granted for this purpose.

No question arose in this case as to whether a receiver, who was not a party to the suit, was competent to raise an objection to the execution of the decree.

In the case of *Ajodhya Roy v. Hardwar Roy* (2) a mortgagee having applied for execution of a decree obtained by him against the mortgagors who were members of a Mitakshara joint family, sought to proceed also against a son of one of the mortgagors who was born after the decree, and the question was whether the son was a proper party to the execution proceedings. It was held that upon the son's birth the aggregate of rights then vested in his father, his grand-father and his uncles, who were the mortgagors, became vested in him conjointly with them, and that by this devolution of interest the son became the representative of a party to the suit within the meaning of section 244 of the Code of 1882. It was ruled that the term "representative" means not merely legal representative in the sense of heir, executor or administrator, but includes any representative-in-interest, that is, any transferee of the interest of the decree-holder or judgment-debtor, who so far as such interest is concerned, is bound by the decree. [*Ishan Chandra*

(1) (1911) 14 C. L. J. 55.

(2) (1909) 9 C. L. J. 485.

*v. Beni Madhub* (1); *Gulsari Lal v. Madho Ram* (2)]. To determine, therefore, whether a particular person is a representative of a party to the suit, the two tests to be applied are first, whether any portion of the interest of the decree-holder or of the judgment debtor which was originally vested in one of the parties to the suit, has by act of parties or by operation of law, vested in the person who is sought to be treated as representative, and, secondly, if there has been a devolution of interest, whether, so far as such interest is concerned, that person is bound by the decree."

No question touching the position of a receiver was considered in this case. It is, therefore, not an authority for the proposition that a receiver is a representative of a party to the suit within the meaning of section 47 of the Code, on the ground that the interest of that party is vested in him.

*Tokra Bibi v. Zabeda Khatoon* (3). This is a suit to wind up a partnership business brought by a partner against the heirs of a deceased partner. It was held that a receiver subsequently appointed by a Court in a partition suit between the heirs of the deceased was a necessary party to the suit for winding up. Mookerjee, J. stated that the test to be applied was whether the property in the hands of a receiver was intended to be affected by the result of the litigation, because if the property was intended to be so affected, the receiver was a proper and necessary party by way of addition to and not in substitution for, the parties primarily responsible. But his Lordship went on to say :

"It may be conceded that the appointment of a receiver does not by itself debar a creditor of the person over whose estate the receiver is appointed from pursuing his legal remedy by action against such debtor, or from bringing a suit for relief touching the same property; this general rule, however, is subject to the qualification that the suit so brought does not in any way interfere with the possession or jurisdiction of the court by which the receiver was appointed. If the contrary view was maintained and the decree made in such a suit were allowed to operate to the disturbance of the custody of the receiver when he had not been made a party to the suit, the very object to the appointment of a receiver might be defeated; that object is to protect the estate from unnecessary and expensive litigation: to preserve it for the equal benefit of those equally interested in its distribution and to

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(1) (1896) I. L. R. 24 Cal. 62.

(2) (1904) L. L. R. 26 All. 447.

(3) (1910) 7 I. C. 75.

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keep the property at all times within the control of the court by which the receiver had been appointed."

This case goes no further than to say that receivers in possession of partnership property are necessary parties to a suit for dissolution of that partnership.

*Dinesh Chandra Roy Choudhury v. Munshi Jahanali Biswas*

(1). After a judgment-debtor had been adjudicated insolvent, the decree-holder who was unaware of the insolvency, proceeded to execution and purchased the attached property. The receiver in insolvency having applied to have the sale declared void, it was held that his application must be treated as one under section 47 of the Civil Procedure Code, he being the representative of the judgment-debtor for the purpose of saving the property from execution. Guha and Bartley JJ. expressed their decision on this point in these words :

"The receiver in whom the property of the insolvent vested after the passing of the order of adjudication under section 28, sub-section (2) of the Provincial Insolvency Act, does represent both the insolvent and the creditors of the insolvent ; and if any application is made to the court which on the face of it was an application made in the interest of the insolvent judgment-debtor, the application, in our judgment, could, under the law, be treated as an application under section 47 of the Code of Civil Procedure, made by the Receiver-in-Insolvency, as representative of the insolvent judgment-debtor."

Their Lordships were careful to confine their decision to the case of a receiver-in-insolvency, that is to say, of a receiver in whom the property of the judgment-debtor stood vested, and in the course of their judgment they quoted the following observation of Rankin C. J. in the case of *Mohitosh Dutta v. Rai Satish Chandra Choudhury Bahadur* (2) :

"Any general statement to the effect that a Receiver is or is not representative for the purposes of section 47 of the Code is merely misleading. It all depends on the purpose and nature of the application made by the Receiver, whether he is a representative of the judgment-debtor or not. For some purposes, he would be entitled as representing, the judgment-debtor to litigate matters under section 47 of the Code."

It is worthy of note that in *Mohitosh Dutta's case* (2) the learned Chief Justice went on to draw a clear distinction :

(1) (1934) 39 C. W. N. 424.

(2) (1931) 35 C. W. N. 971.

"but where he comes to the executing court for the purpose of saying that as the judgment-debtor's property now belongs to the Receiver, the Court cannot sell for the judgment-debtor's debt that which is the property of another person because it has vested in the Receiver for the benefit of the creditors, then for that purpose, the Receiver is not, in my judgment, a representative of the judgment-debtor.....The Receiver in such a case, if he is not acting under section 52 of the Act and acting under the usual provisions of the Civil Procedure Code, is really a third party making a claim."

The actual facts in the case of *Mohitosh Dutta v. Rai Satish Chandra Choudhury Bahadur* (1) were that a decree-holder had applied for execution of a money decree, and the judgment-debtor's property had been sold before the judgment-debtor was adjudicated insolvent. Then an interim receiver was appointed in whom nothing vested but who had the power of a receiver under the Civil Procedure Code. This receiver applied under Order XXI, rule 90 to set aside the sale. It was held that the application was not one competently made by the receiver under section 47 of the Civil Procedure Code.

The precise circumstances under which a receiver in insolvency may maintain, as representative of the judgment-debtor, an objection to execution under section 47 of the Code, do not require to be discussed here. We are concerned with a receiver appointed under the Code who occupies a capacity by no means identical with that of a receiver-in-insolvency, the powers and functions of the latter being very different in extent. The fundamental distinction is that the legal estate in the property of an insolvent is vested in the receiver-in-insolvency, whereas no property is vested in the receiver appointed under the Code who is merely the manager appointed by the court of the properties in question. The cases of *Dinesh Chandra Roy Choudhury v. Munshi Jahanali Biswas* (2) and *Mohitosh Dutta v. Rai Satish Chandra Choudhury Bahadur* (1) seem to indicate that a receiver would have no *locus standi* as representative of a party to a suit to maintain an objection under section 47 of the Code, unless the property of the party was vested in him.

*Annappurna Das v. Sarat Chandra Bhattacharjee* (3). This was a suit for a declaration that a mortgage by a receiver and a

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(1) (1931) 35 C. W. N. 971.

(2) (1934) 39 C. W. N. 424.

(3) (1941) 46 C. W. N. 355.

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decrees in enforcement thereof were not binding on the owners of the property mortgaged. The receiver was appointed under Order XL, rule I of the Civil Procedure Code, and he executed the mortgage with the sanction of the court which appointed him. One of the questions raised was whether the plaintiffs who were the owners of the property should have been made parties to the mortgage suit. Akram and Pal JJ. said :

"There is no express order of the court appointed the receiver allowing the receiver to represent the true owners in the mortgage suit. Admittedly the property never vested in the receiver, his appointment being only under Order XL, rule I Civil Procedure Code. The property was only in the custody of the court and the receiver was simply managing the estate as an officer of that court. No doubt while he mortgaged the property with the sanction of the court he must be taken to have represented the owners of the property. But that was the effect of the express sanction given by the court."

The observation just quoted in no way supports the contention that a receiver appointed under the Code is in exactly the same position as the owner of the equity of redemption of a mortgaged property, or that he is the latter's representative in all litigation relating thereto.

The illustrate the true position of a receiver in proceedings affecting property of which he is in charge, reference may briefly be made to the following cases cited on behalf of the respondent.

*Harikar Mookerjee v. Harendra Nath Mookerjee* (1). The question in this case was whether a receiver appointed by a Court of the assets of a deceased person could be described as a person claiming to be entitled to the effects of the deceased person within the meaning of section 4 of the Succession Act of 1889. Mookerjee and Carnduff JJ. said :

"It is well settled that a Receiver by his appointment does not become the representative of the parties, but is an officer and representative of the Court which appoints him. The effect of the appointment of a Receiver is to bring the subject matter of the litigation in *custodia legis*, and the Court can effectively manage the property only through its officer, who is the Receiver. In other words, the Receiver ordinarily is not the representative or agent of either party in the administration of the trust, but his appointment is for the benefit of all parties, and he holds the

(1) (1910) I. L. R. 37 Calo. 754; 12 C. L. J. 258.

property for the benefit of those ultimately found to be the rightful owners....."

The true position of a receiver in possession of property which is the subject of litigation was again expounded by Mookerjee J. in the case of *Dwijendra Narayan Roy v. Joges Chandra De* (1). At page 57 of the report there is a passage in the judgment which is in the following words :

"When the Court has appointed a receiver and the receiver is in possession, his possession is the possession of the Court, and the possession of the Court by its receiver is the possession of all parties to the action according to their titles : *In Re Butler's Estate* (2) ; *Bertrand v. Davies* (3) *Moir v. Blacher* (4) ; *Re Ind. Coops & Co.* (5). The property passes into legal custody as the receiver is in the position of stake-holder, and such custody is for the benefit of the true owner : *Brajendra Kishore v. Abdul Rasak* (6) ; *Ramaswamy v. Muthusamy* (7) ; *Ahagendra v. Matangini* (8) ; *Rao Karan v. Rajah Bakar Ali* (9) ; *Jagat Tarini v. Naba Gopal* (10)"

In the case of *Raj Raghubar Singh v. Jai Indra Bahadur Singh* (11) their Lordships of the Privy Council made it clear (page 236 of the report) that sections 47 and 144 of the Code apply only to the parties or the representatives of the original parties and not to sureties.

*Fraser and Ross v. Krishnaswamy Aiyer* (12). In this case it was held that a mortgagee decree-holder is bound to apply to the Court which has, in another suit, appointed a receiver of the mortgaged properties, for leave to execute his decree, and cannot, without such leave, proceed to sell such properties. Devadoss J. observed as follows :

"The Court having taken possession of the properties it appoints an officer to look after the properties on behalf of all the parties and a Receiver is not a legal representative of any party ; nor is he a new party to the proceedings. But he represents all the parties for some purpose and his duty is that which is assigned to him by the Court."

These remarks make it clear that though a receiver is in many

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(1) (1923) 39 C. L. J. 40.

(2) (1863) 13 Ir. Ch. R. 454.

(3) (1862) 31 Beav. 429.

(4) (1890) 26 L. R. Ir. 375.

(5) (1911) 2 Ch. 223.

(6) (1915) 22 C. L. J. 283.

(7) (1906) I. L. R. 30 Mad. 12.

(8) (1890) L. R. 17 I. A. 62 ; I. L. R.

(9) (1882) L. R. 9 I. A. 99 ; I. L. R. 5 All. 1.

17 Calo. 814.

(10) (1907) I. L. R. 34 Calo. 305 ; 5 C. L. J. 270

(11) (1919) L. R. 46 I. A. 228.

(12) (1922) I. L. R. 47 Mad. 47.

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cases a necessary party to a suit, he is not the representative of any particular party thereto.

In our judgment, it cannot be said that the words "Parties to the suit" or the words "their representatives" in section 47 of the Code can be extended to include a mere receiver appointed under Order XL, rule I of the Code to take charge of property which is subsequently sold in execution of a decree suffered by the owner thereof. Nor can it be said that the omission to make such a receiver a party to the execution proceedings which have led up to the sale renders those proceedings void. It, therefore, follows that the receivers in the present case are not competent to challenge the execution of the decree on the ground of limitation or any other ground within the scope of section 47 of the Code.

It follows also that the execution proceedings were not void *ab initio* and that as the receiver's application under Order XXI, rule 90 of the Civil Procedure Code was itself barred by limitation, that application must fail.

Two other questions were argued which would have had to be considered if the main argument dealt with above succeeded.

It was contended, firstly, that the application for execution of the mortgage decree which was preferred on the 2nd of July, 1938, was barred both under Article 182 of the Indian Limitation Act and section 48 of the Civil Procedure Code, and that it was open to the appellants to take this objection even after the sale had taken place. Secondly, it was urged that the application for execution of the mortgage decree was not maintainable at the instance of the Raja of Pachit who was the assignee of that decree. Finally, we were invited to allow Mr. Sedan, one of the mortgagors judgment-debtors, to be joined with the receivers as an applicant in the applications out of which this appeal has arisen. It is not necessary for me to add anything to what has been said by my learned brother regarding these matters, as, for the reasons indicated by him, I agree in the decision which he has pronounced.

This appeal accordingly fails and must be dismissed with costs.

P. S.

*Appeal dismissed*

*Before Mr. Justice B. K. Mukherjee and Mr. Justice  
T. H. Ellis.*

HRISIKESH SAHA AND OTHERS

v.

SREEMATI RADHARANI KAR.\*

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March, 22, 23,  
May, 4.

*Civil Procedure Code (Act V of 1908), section 48, order 21, rule 11, order 22, rule 12, order 47, rule 1—Death of judgment-debtor during course of execution proceedings—Application for bringing on record legal representatives of the deceased judgment-debtor more than 12 years after decree, if a fresh application under section 48 of Civil Procedure Code.*

"Fresh application" as used in section 48 of the Code of Civil Procedure means a fresh substantive application and not merely an ancillary one made with the object of moving the Court to proceed in the matter of a substantive application already on the file.

*Rahim Ali v. Phulchand* (1); *Ram Sarup v. Dasrath* (2) followed.

When a decree-holder applied to continue execution proceedings against the legal representatives of a deceased judgment-debtor it is not a fresh application for execution so as to attract the provisions of section 48 of the Civil Procedure Code.

Where, however, the decree-holder after he has presented his application for execution, wants to proceed against any new party whose name was not mentioned in the petition or wants to attach and sell any new property not included in it, the application may be regarded as a fresh application for execution.

As under order 22, rule 12 of the Civil Procedure Code the provisions of rules 3 and 4 of that order do not apply to execution proceedings there is no question of limitation with which substitution of the legal representatives of the deceased judgment-debtor.

Appeal by the Decree-holder.

Application for execution.

The material facts will appear from the judgment.

*Messrs. Gopal Chandra Das, Narendra Kumar Bhowmick and Bhuban Mohan Saha* for the Appellants.

*Messrs. Amarendra Nath Bose, Promotho Nath Mitra, Samarendra Krishna Deb and Sudhir Ranjan Dutt* for the Respondents.

The judgment of the Court was as follows :—

\* Appeal from Original Order No. 159 of 1943 against the order of N. N. Dey, Esq., Subordinate Judge, 2nd Court, 24-Parganas, dated the 13th May, 1943 allowing an application under order 47, rule 1 Civil Procedure Code for review of the order, dated the 5th April, 1943.

(1) (1896) I. L. R. 18 All. 482 (F.B.)

(2) (1911) I. L. R. 33 All. 517. (F.B.)



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Hrishikesh Saha

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May, 4.

**Mukherjea, J.:**—The facts giving rise to this appeal may be shortly stated as follows: Certain persons who may be called the Sahas and who are represented in this appeal by the appellants and proforma respondent obtained a final mortgage decree against one Akhoy Kumar Kar in the Court of the 2nd Subordinate Judge of 24-Parganas for a sum of Rs. 1,19,000 and odd on the 13th of June, 1930. The decree was put into execution on the 8th of August, 1930, the execution case being registered as Title Execution Case No. 187 of 1930, and it is admitted that no portion of the decretal dues has been realised up till now. On the 23rd of December, 1941, the judgment-debtor Akhoy died. The death was reported to the Court on the 10th of January, 1942, and on the 5th of March, 1942, the decree-holders made an application for continuing the execution proceedings against the widow and sons of the judgment-debtor on substitution of their names as legal heirs in place of the deceased. The widow whose name is Radharani and who figures as respondent No. 1 in this appeal objected to the application for substitution made by the decree-holders on the ground that the judgment-debtor having died leaving behind a Will by which she was appointed the sole executrix, she alone was the legal representative of the deceased and that there could be no substitution of the intestate heirs of the judgment-debtor in the execution proceeding. It was stated by her in the petition of objection that she had already applied for probate of the Will though no grant was actually made in her favour at that time. The Court by its order dated the 25th April, 1942, dismissed her objection and allowed substitution of all the intestate heirs of the judgment-debtor including Radharani, the widow. It is rather curious to notice that on the very same day orders for substitution were made in two Miscellaneous Cases (Miscellaneous Cases Nos. 39 of 1940 and 8 of 1941) which arose out of objections filed by the judgment-debtor in the same execution case, and in both of them Radharani was allowed to be substituted in her capacity as executrix as the sole legal representative of the deceased of the judgment-debtor. On the 8th of June, 1942, the probate Court made an order granting probate of the Will to Radharani and on the 16th of September, 1942, she brought this fact to the notice of the executing Court. On the 29th of September, 1942, the decree-holders applied for amendment of the execution petition by describing Radharani as the sole executrix and legal representative of the judgment-debtor and striking out the names of the other heirs from the execution record. On the 1st of October, 1942, this

application was allowed, and the execution petition was amended. On the 3rd of October, 1942, Radha Rani filed a petition objecting to the execution of the decree contending inter alia that as the application for substituting her as the sole legal representative of the deceased judgment-debtor was made more than 12 years after the date of the decree it was in substance a fresh application for execution and consequently the execution case was barred under section 48 of the Civil Procedure Code. The Subordinate Judge by his order dated the 5th of April, 1943, overruled this contention and held that section 48 of the Civil Procedure Code could not be attracted to the facts of this case, as the application of the decree-holders made on the 29th of September, 1942, was merely ancillary to the original petition for execution and could not be treated as a fresh application within the meaning of section 48 of the Civil Procedure Code. Later on, however, there was an application made by Radha Rani for review of the order made on the 5th of April, 1943, and the learned Judge by a fresh order made on the 13th of May, 1943, vacated the earlier order and dismissed the execution case being of opinion that the application for bringing Radha Rani on the record as the sole legal representative of the judgment-debtor was a fresh application for execution as contemplated by section 48 of the Civil Procedure Code and as that application was presented more than 12 years after the date of the decree the execution of the decree was barred. It is against this order that the decree-holders have come up on appeal to this Court.

Having heard the learned Advocates on both sides we are of the opinion that the order made by the Subordinate Judge on the 13th of May, 1943, is a wrong order and cannot be sustained. We agree with the learned Advocate for the appellants that there were none of the grounds contemplated by Order XLVII Rule 1 of the Civil Procedure Code upon which the Court could set aside, by way of review, the previous order made by it on the 5th of April, 1943. There was no error apparent on the face of the record nor discovery of any new and important piece of evidence subsequent to the passing of the order. If the decision was erroneous, it was open to the judgment-debtor to challenge it by way of appeal. But it is not necessary for us to base our decision on this somewhat technical point, for we are definitely of opinion that the view of law taken by the Subordinate Judge in the subsequent order made on the 13th of May, 1943, is not sound and cannot be accepted. The whole controversy really centres round the point as to whether the application made by the decree-holders on the 29th

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September, 1942, was in substance a fresh application for execution within the meaning of section 48 of the Civil Procedure Code. It is well settled by authorities that the expression "fresh application" as used in section 48 of the Civil Procedure Code means a fresh substantive application and not merely an ancillary one made with the object of moving the Court to proceed in the matter of a substantive application already on the file: vide *Rahim Ali v. Phul Chand* (1); *Ram Sarun v. Dasrath* (2). Section 48 of the Civil Procedure Code does not lay down that as soon as the period of twelve years elapses from the date of the decree the executing Court becomes *functus officio* and cannot proceed with the execution of the decree any further. Provided no fresh application for execution is presented after the lapse of 12 years from the date of the decree the executing Court can certainly continue a proceeding in execution commenced but not completed before the expiry of 12 years and if an application has got to be made by the decree-holders in furtherance of and ancillary to the petition for execution already filed, section 48 of the Civil Procedure Code would have no application. Mr. Bose argues that if a judgment-debtor dies pending an execution proceeding and the decree-holder applies for continuation of the proceeding against his heirs under section 50 of the Civil Procedure Code, it amounts to a fresh application for execution and if it is made when 12 years have already passed from the date of the decree, it would come within the mischief of section 48 of the Civil Procedure Code. We cannot accept this contention as sound. When the judgment-debtor dies pending an execution proceeding it is not necessary for the decree-holder to file a fresh application under Order XXI, Rule 11 of the Civil Procedure Code. He can continue the same execution proceeding against the heirs of the deceased by bringing them on record in place of the original judgment-debtor: vide *Purushottam v. Rajbai* (3). It has been held further by the Bombay High Court that even if any separate application is made in such circumstances it would not be a fresh application within the meaning of section 48 of the Civil Procedure Code: vide *Shankar v. Hirulal* (4). The Subordinate Judge has relied strongly on a decision of the Patna High Court which is to be found reported in *Maharaja Ram Ram Bijaya v. Kesto Prasad* (5). The facts of that case however are quite different. We are quite prepared to hold that if the decree-

(1) (1896) I. L. R. 18 All. 482 (F. B.). (2) (1911) I. L. R. 33 All. 517. (F. B.).

(3) (1940) I. L. R. 34 Bom. 142.

(4) (1931) 33 Bom. L. R. 858.

(5) (1940) A. I. R. Pat. 571.

holder after he has presented his petition for execution wants to proceed against any new party whose name was not mentioned in the petition or wants to attach and sell any new property not included in it, the application might be regarded as a fresh application for execution. But this principle cannot possibly apply where the decree-holder does not want to proceed against any new party but prays for continuation of the proceeding against an heir or legal representative of the judgment-debtor originally on the record. In our opinion, therefore, if the application made by the decree-holders on the 29th of September, 1942, be regarded as a fresh application for execution against the legal representative of the deceased judgment-debtor under section 50 of the Civil Procedure Code, it would be merely ancillary to the substantive petition against the original judgment-debtor and could not rank as a fresh application within the meaning of section 48 of the Civil Procedure Code. As under Order XXII, Rule 12 of the Civil Procedure Code the provisions of Rules 3 and 4 of that order do not apply to execution proceedings, no other question of limitation regarding the time within which substitution has to be made can possibly arise.

Furthermore, it appears, as stated above, that in the two miscellaneous cases arising out of the same execution proceeding Radha Rani got herself substituted as the sole executrix and legal representative of her husband and the orders were made by the Court in the same execution record on the 25th April, 1942 when 12 years had not run out from the date of the decree. She thus introduced herself as a party to the execution case in her capacity as representative of her husband's estate. In those circumstances the application of the decree-holders presented on the 29th of September, 1942, can be treated as a formal application for correcting the description of Radha Rani in the cause title of the execution case and nothing more, she being already made a party to the execution case on her own application and within 12 years from the date of the decree.

In the result therefore the appeal is allowed. The order of the learned Subordinate Judge dated the 13th May, 1943, is set aside and that made on the 5th April, 1943, restored. The appellants will be entitled to the costs of this appeal. Hearing fee three gold mohurs.

ELLIS, J.:—I agree.

A. K. D. G.

*Appeal allowed.*

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*Before Mr. Justice B. Mukherjee and Mr. Justice Ellis.*

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1945.

January, 29,  
February, 20.

SIDDIQ AHMED CHOUDHURY

v.

SAYED AHMED CHOUDHURY

AND OTHERS.\*

*Muhammadian Law—Wakf—Power to change the terms of or the personnel in the wakf deed not reserved in the deed—Wakif, if can alter the same after the wakf was in force—Opinions of Abu Hanifa, Abu Yusuf and Imam Mohammed—Fatwa Alamgiri, the recognised authority in India about wakf—Opinion of Imam Mohammed adopted.*

It is quite true that on account of the high judiciary office held by Abu Yusuf the mahomedan doctors attach the highest authority to his opinion on matters of civil law, though in matters spiritual and those relating to inheritance the views respectively of Abu Hanifa and Imam Mohammed are considered authoritative. It is also a general rule of interpretation adopted by mahomedan lawyers that when there is a difference of opinion between the three masters (Abu Hanifa and his two disciples Abu Yusuf and Imam Mohammed) the opinion of two is allowed to prevail against the opinion of the third (Vide—Mullah's Mahomedan Law, 12 Edn page 25). These rules are however not inflexible rules of law, nor are they of universal application.

In the early days when new points arose and the decision had to depend on inferences drawn from other fatwas or from analogy, it was open to the learned doctors to prefer one opinion to the other which they considered more correct and consonant with the other principles, inasmuch as the three imams were not lawgivers but merely interpreters of Law.

*Anis Begum v. Muhammad Isiafomali Khan* (1) referred to

It may be that there was some difference of opinion amongst the ancient jurists but the duty of the Court in modern times is to see which of the two opinions, if any, has been accepted by later commentators who are of recognised authority in India, and if we find that they have consistently adopted one particular view to the exclusion of the other, it would be presumptuous to attempt at this day to decide the point on the basis of original authorities by application of any general rule of interpretation.

It would be wrong for the courts on a point of this kind to attempt to put their own interpretation on the Quoran in opposition to the expressed

\* Letters Patent Appeal No. 9 of 1944, against the judgment of Hon'ble Mr. Justice Henderson, dated 22nd May, 1944, in Appeal from Appellate Decree No. 1890 of 1943, against the decree of G. B. Synge Esq., District Judge of Zillah Chittagong, dated the 16th September, 1943, affirming the decree of Sallee Chandra Sen Gupta, Munsif, and Court, Chittagong, dated the 12th May, 1943.

(1) (1963) I. L. R. 55 All. 743.

ruling of commentators of such great antiquity and high authority (as the Hedaya and Fatwa Alamgiri).

*Aga Mahomed Jaffer v. Koolson* (1) referred to.

According to Abu Yusuf the mutwalli is taken to be a deputy of the wakif and is consequently removable by the latter at his option, whereas according to Imam Mahomed the mutwalli is a deputy of the beneficiaries and consequently the wakif has no power to discharge him unless he reserved such power at the time of dedication.

*Radd-ul-Mukhtar*, Vol. III p 63; *Amcer All*, 4th Edn. pp 458-9; *Baillee's Digest of Muhammedan Law*, 2nd Edn, p 601; *R. Wilson's Digest on Anglo Muhammedan Law* 6th Edn, section 332 p 370 referred to.

*Hidaitoonnessa v. Syed Afzal Hossain* (2); *Golam Hossain v. Ali Ajan* (3), and *Mussumat Rahiman v. Mussumat Baqridan* (4) referred to.

Appeal by Plaintiff.

Suit for declaration of title to act as mutwalli.

The material facts will appear from the following judgment of

**Henderson, J.:**—This appeal is by defendant No. 1 and raises a point in connection with the Mahammedan Law. The facts are these:—Defendant No. 4 is the full brother of the plaintiff. Defendants Nos. 1 to 3 are his half brothers. Their father, Osi Mia, created a wakf on 30th January, 1934. He appointed himself as the first mutwalli. It was further provided in the wakfnama that he was to be succeeded by his sons in rotation, each of them for a period of four years. He resigned on 5th June, 1940 and died on 16th April, 1941. Thus under the terms of the wakfnama the plaintiff was entitled to be mutwalli on the date when the suit was instituted.

The present dispute relates to the legal effect, if any, of two subsequent deeds—Ext. C, executed on 9th October, 1939 and Ext. B, executed on 5th June, 1940. The learned Munsif held that they had no legal effect. The learned District Judge, while dismissing an appeal by defendant No. 1, refused to decide the question and left it open. I must confess that I find it difficult to follow this. The question is the most vital question arising for decision in the case. If these deeds were effective, the present suit will automatically fail. No disputed questions of fact, however, are involved and it is therefore unnecessary to order a remand.

(1) (1897) I. L. R. 25 Calo. 9 (P. C.)

(2) (1870) 2 N. W. P. H. C. R. 420.

(3) (1868) 4 M. H. C. R. 44.

(4) (1935) I. L. R. 11 Luck. 735 (F. B.)

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Choudhury.

Henderson, J.

Osi Mia was the *mutwalli* of another *wakf* created by his father, Azgar Ali. He took the view, probably very wisely, that it would be a good thing if the management of the properties were kept distinct. He was to be succeeded by two of his sons. He, accordingly, executed Ext. C by which he provided that those of his sons who were *mutwallis* of Azgar Ali's *wakf* were to be excluded from the *mutwalliship* of his (Osi Mia's) *wakf*. He executed Ext. B, when he felt that he was too old to continue in the management of the properties and resigned. He appointed defendants Nos. 2 and 3 to succeed to *mutwalliship* of Azgar Ali's *wakf*. He further provided that any of his sons acting contrary to the terms of Ext. B or C would be disqualified from acting as *mutwallis*.

Thus under all the deeds the plaintiff was entitled to be *mutwalli* when he filed the suit, unless he had forfeited his right. On Osi Mia's death he got himself enrolled as *mutwalli* of Azgar Ali's *wakf* in the office of the Commissioner of *wakfs*. When his name was removed therefrom on an objection by the appellant, he instituted a suit to establish his right to be *mutwalli*. He thus attempted to become manager of both the properties, and therefore forfeited his right as laid down in Exts. B and C. The result is that if these documents are valid, the present suit will fail.

Osi Mia did not expressly reserve to himself in the *wakfnama* the power to remove a *mutwalli*. The question for consideration now is whether in such circumstances he had power to do so by later deed.

The learned Munsif relied on Mulla's "Principles of Mahomedan Law" (Vide paragraph 172 in the 11th Edition). The same view was taken by Wilson (vide paragraph 332 in his Anglo-Mahomedan Law, Sixth Edition).

This opinion is also supported by the decision in *Mt. Rahman v. Mt. Baqridan* (1) and *Registered Corporation named Jamiat Wa Tabligh Islam through Mohammad Abdulla Khan v. Mohammad Sharif* (2).

The authorities are not, however, uniform. Ameer Ali in his "Mahomedan Law" points out that there is a difference of opinion on this point between Abu Yusuf and Mohammed, the former supporting the appellant and the latter the respondent. When

(1) (1936) A. I. R. Oudh, 213.

(2) (1938) A. I. R. Lah, 869.

they differ from each other, the authority of Abu Yusuf is generally preferred (vide Mulla's Mahomedan Law, paragraph 28). This view has been accepted in this Court in the decisions in *Jinjira Khatun v. Mohammad Fakirulla Mia* (1) and *Debendra Nath Sadhukhan v. Naharmal Jalan* (2).

In this state of the authorities, it must be held that the opinion of Abu Yusuf prevails, at any rate, so far as Bengal is concerned.

The appeal must accordingly be allowed, and the suit dismissed. As the appellant has no right to be *mutwalli* or to interfere with the actual management of the properties, I shall not allow him any costs. I accordingly direct that the parties bear their own costs throughout.

No order is necessary on the Rule. Leave to appeal under clause 15 of the Letters Patent is granted.

The plaintiff then appealed under section 15 of the Letters Patent.

*Dr. Sarat Chandra Basak* and *Mr. Imam Hossain Chowdhury* for the Appellant.

*Messrs. Hirulal Chakravarty* and *Rabindra Nath Bhattacharjee* for the Respondents.

The judgment of the Court in the Letters Patent appeal was delivered by

**Mukherjee, J. :** This is an appeal under clause 15 of the Letters Patent and it is directed against a judgment of Mr. Justice Henderson dated May, 22, 1944 passed in Second Appeal No. 1890 of 1943. The appellant before us is the plaintiff and the suit was one commenced by him for establishment of his title as *mutwalli* in respect of a *wakf* created by his father Osi Mia and for a permanent injunction restraining defendants Nos. 1 to 3 from interfering with his possession as *mutwalli* of the *wakf* estate. The material facts are not in controversy and may be stated as follows :—

The plaintiff as well as the four defendants in the suit are all sons of Osi Mia, though their mothers were not the same. Osi Mia married three wives in succession ; the plaintiff and the pro-forma defendant No. 4 are the two sons by his first wife. By the second wife also Osi Mia had two sons and they are defendants 1 and 3 in the suit ; the defendant No. 2 is the only son born of the third wife of Osi Mia. On the 30th January, 1934, Osi Mia created a *wakf* in respect of certain properties and appointed

(1) (1921) I. L. R. 49 Cal. 477.

(2) (1930) A. I. R. Cal. 673.

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himself *mutwalli* of the *wakf* estate. The provision in the deed of *wakf* was that after his death all his sons would become *mutwallis* by rotation and each one of them would hold the offices for a period of four years only. It appears that Asgar Ali, the father of Osi Mia, had also made a *wakf* in respect of his own property some time in the year 1885 and Osi Mia became the sole *mutwalli* of his father's *wakf* after the death of his brother Gani Mia. On the 9th October, 1939, Osi Mia executed, what has been called a deed of rectification and it is marked exhibit C in this case, and it was provided by this deed that those of his sons who would be *mutwallis* in respect of the *wakf* created by his father Asgar Ali would not be competent to act as *mutwalli* of his own *wakf*. On the 5th June, 1940, another deed was executed by Osi Mia by which he purported to resign his office as *mutwalli* of both the *wakfs* and appointed his 3rd and 5th sons *mutwallis* of his father's *wakf* and the 1st, 2nd and 4th sons *mutwallis* of the *wakf* created by himself. In this document it was expressly laid down that any of his sons acting contrary to the provisions of this deed or the earlier deed of rectification would forfeit his title to act as *mutwalli* with regard to any of these *wakfs*. Osi Mia died on the 16th April, 1941, and after his death certain dispute arose regarding succession to *mutwalliship* in respect to both the *wakf* estates. The plaintiff being the eldest son of Osi Mia was undoubtedly entitled to come in first as *mutwalli* of his father's *wakf* and held the office for a period of four years according to the terms of the *wakfnama* and after his period was over the next term would be that of his own brother, the pro-forma defendant No. 4 who is the second son of Osi Mia. The defendant No. 1 and the other step brothers of the plaintiff however disputed his claim to act as *mutwalli* of Osi Mia's *wakf* on the ground that the plaintiff along with his full brother, defendant No. 4, had got themselves enrolled as *mutwallis* of Asgar Ali's *wakf*. At the objection of defendant No. 1 the order recording their names as *mutwalli* of the said *wakf* was vacated, but even then the plaintiff filed a civil suit to establish his right. As these acts amounted to violation of the terms of the deed of rectification and the subsequent document executed on the 5th June, 1940, the plaintiff, it was said, forfeited his right to be appointed a *mutwalli* of his father's *wakf*. As on these allegations the defendants 1-3 denied the title of the plaintiff to act as *mutwalli* of Osi Mia's *wakf* and threatened to dispossess him, the present suit was brought.

The suit was contested by defendants 1 and 2, and their allegations in substance were that the two later deeds executed by Osi Mia on the 9th October, 1939, and 5th June, 1940, should be taken as integral parts of the original wakfnama and the plaintiff having violated the express provisions of the later deeds, was not competent to act as Mutwalli.

The Munsif who heard the suit overruled the defence and decreed the plaintiff's suit. It was held that the subsequent documents executed by Osi Mia could not alter the terms of the original deed of wakf, as the founder had not reserved to himself the power of making changes when he executed the wakfnama and divested himself of his ownership in the dedicated properties.

On appeal the District Judge of Chittagong affirmed the decision of the munsif but kept open the question as to whether the founder could make any changes in the provisions of a deed of wakf when no such rights were reserved to him at the time of creating the wakf. The learned District Judge based his decision entirely on the grounds that as the plaintiff had actually succeeded to the office of Mutwalli after the death of his father, he could be removed only by the Kazi, and so long as he was not removed, it would not be competent for a third party, as the defendants were in this case, to interfere with his management. Against this decision a second appeal was taken to this Court which was heard by my learned brother Henderson, J. sitting singly. Mr. Justice Henderson rightly pointed out that the real point for decision in this case was whether it was competent to Osi Mia as the founder of the wakf to alter the provisions of the wakfnama by subsequent deeds of rectification and appointment and that the District Judge was entirely wrong in keeping that question open. My learned brother allowed the appeal and dismissed the plaintiff's suit, being of opinion that the wakf had the power of making alterations regarding appointment of Mutwallis even if no such power was reserved to him by the deed of wakf. It is against this decision that this appeal has been filed by the plaintiff under clause 15 of the Letters Patent.

The question that requires determination in this appeal is undoubtedly one of general importance in relation to the Mohomedan law of wakf and so far as this Court is concerned, there is no previous authority on the point. The question is whether a founder or wakif under Mahomedan Law after he has dedicated his property to the Almighty and made provisions for the appointment of Mutwallis can subsequently alter the arrangement and

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remove the Mutwallis appointed by him if he had not reserved such powers for himself when he created the wakf. Unfortunately there is a divergence of opinion on this point entertained by notable Mahomedan jurists. The three great exponents of Sunni law are Abu Hanifa and his two disciples, Abu Yusuf and Imam Mohomed. There is nothing said by the master, as regards the question that arises for consideration in the present case, but there is a clear difference of opinion between his two disciples. Abu Yusuf holds that "the wakif is absolutely entitled to remove the Mutwalli appointed by himself whether he has reserved the power or not". Imam Mohomed differs, holding that "it is only when the wakif has reserved the power that he can remove the Mutwalli without any misfeasance" (Ameer Ali, Mahomedan Law 4th Edn. page 458). Henderson, J. has held that in case of difference of opinion between the two disciples of Abu Hanifa the view taken by Abu Yusuf should prevail at least so far as Bengal is concerned, and accordingly he has dismissed the plaintiff's suit. It is quite true that on account of the high judiciary office held by Abu Yusuf the Mahomedan doctors attach the highest authority to his opinion on matters of civil law, though in matters spiritual and those relating to inheritance the views respectively of Abu Hanifa and Imam Mohomed are considered authoritative. It is also a general rule of interpretation adopted by Mahomedan lawyers that when there is a difference of opinion between the three masters (Abu Hanifa and his two disciples) the opinion of the third shall prevail—*vide* Mulla's Mahomedan Law 12th Edn. page 25. These rules are however not inflexible rules of law, nor are they of universal application. As Sulaiman, C. J. points out in *Anis Begam v. Muhammad Istafawali Khan* (1) these rules of preference were for the guidance of ancient jurists and different doctors have followed different rules of preference. "Those who are more orthodox", thus observed the learned C. J., "and generally speaking more ancient, prefer the solitary opinion of Abu Hanifa to even the joint opinion of his disciples. But such rules are helpful only when there is no clear consensus of opinion. In the early days when new points arose and the decision had to depend on inferences drawn from other *fatawas* or from analogy, it was open to the learned doctors to prefer one opinion to the other which they considered more correct and consonant with the other principles, inasmuch as the three Imams were not law-givers but merely interpreters of the law. But if one finds a question

(1) (1933) I. L. R. 55 All. 743.

well thrashed out and in later centuries, a particular interpretation adopted by the leading doctors and text-book writers, it would not be proper for us in the twentieth century to go behind such a consensus of opinion and decide a point contrary to such opinion, on the ground that the majority of the three Imams favoured that view in the earlier centuries."

These observations in our opinion fully apply to the facts of this case. It may be that there was some difference of opinion amongst the ancient jurists but our duty in modern times is to see which of the two opinions, if any, has been accepted by later commentators who are of recognised authority in India, and if we find that they have consistently adopted one particular view to the exclusion of the other, it would be presumptuous on our part to attempt at this day to decide the point on the basis of original authorities by application of any general rule of interpretation. We may refer in this connection to the observation of their lordships of the Judicial Committee in *Aga Mahomed Jaffer v. Koolson* (2), on which reliance has been placed by Sulaiman, C. J. in the case noted above. "But it would be wrong for the Courts", thus observed their lordships, "on a point of this kind to attempt to put their own interpretation on the Quran in opposition to the expressed ruling of commentators of such great antiquity and high authority" (as the Hedya and Fatawa Alamgiri). So far as the question before us is concerned, the *Fatawa Alamgiri* which is undoubtedly regarded as a work of high authority in India has definitely adopted the view of Imam Mahomed in preference to that of Abu Yusuf. The law on this point is thus stated in Fatawa Alamgiri: "A person having made a wakf of his property and after having transferred it to the curator (Kyyum) desires to take it back from his hands; if he made a condition for himself in the wakf that he should (have power to) discharge the curator and take back the property, in that case he may do so according to Mohommed and not otherwise. But according to Abu Yusuf he may do so [in either case, i. e., whether he has reserved the power or not]. And the *maskaiik* (jurist) of Balkh decided according to Abu Yusuf and the jurist Abu Lais has adopted the same view. The *maskaiik* of Bokhara decided according to the rule of Mohommed and the *fatawa* is thereon; so in the *musmirat*" (Ameer Ali, Mahommeden Law, 4 Edn. page 458.)

The same view is accepted by the author of Radd-ul-Muhtar  
(a) (1897) L. L. R., 25 Calc. 9. (P. C.)

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who explains that according to Abu Yusuf the Mutwalli is taken to be a Deputy of the *wakif* and is consequently removable by the latter at his option, whereas according to Imam Mahommed the Mutwalli is a Deputy of the beneficiaries and consequently the *wakif* has no power to discharge him unless he reserved such power at the time of dedication (Radd-ul-Muhtar, Vol. III, p. 63; see also Ameer Ali, 4th Edn. pp. 458 9). A question very similar to that which arises in the present case has been discussed in *surrat-ul-fatawa* and certain passages from this work which have been quoted by Ameer Ali will demonstrate conclusively that the opinion of Imam Mahommed has been generally followed by later writers. The passages are as follows :

"In the chapter of wakf in the Khazanat-ul-Fatawa it is stated that the Sahib-ul-Manah (the author of the Manah-ul-Ghuffar) was asked about a deed of wakf in which there was a condition to the effect that the *wilayat* of the trust should appertain only to the wakif's male descendants, but now a deed has been discovered bearing a prior date, in which the *towliat* was given to his male as well as female descendants; the question was which deed should be acted upon [in regard to the *towliat*]. The Sahib-ul-Manah answered, if the wakif in the first deed at the time of dedication reserved to himself the power of altering any of the provisions regarding the management, etc., of the wakf, in that case the second deed should be acted upon, that is, the deed in which the *towliat* is restricted to his male descendants. But if he reserved to himself in the original wakf no such power, in that case the first deed of wakf, viz., in which there was no restriction, should be acted upon." (Ameer Ali, 4th Edn. p. 437).

Bailee's Digest of Mahomedan Law which is based primarily upon *Fatawa Alamgiri* adopts the view that reservation of power is necessary before the wakif can discharge an administrator appointed by him when he created the wakf for his lands (Bailee, 2nd Edn. p. 601). R. Wilson in his Anglo-Mahomedan Law lays down the law in the following manner :—

"A Mutwalli once lawfully appointed cannot be removed except by the Court not even by the founder himself unless the power of removal was expressly reserved in the deed of appointment". (R. Wilson's Digest on Anglo-Mahomedan Law, Sixth Edition, section 332 at p. 370).

If we now come to judicial decisions, we find that the few decisions which we have got so far are all in one way and accept the view propounded by the compilers of *fatawa Alamgiri*.

In the case of *Hidaitoonnessa v. Syud Afzal Hossain* (1) the question arose as to whether a man who had devoted property to charitable uses and appointed a trustee or manager, could at his pleasure take the property back from the trustee. The parties were governed by Shia Law which has no express provision on this point. Reliance was however placed on the view expressed in *Fatawa Alamgiri* which was adopted by Bailee in his Digest and also on the opinion of Macnaghten which was in identical terms, and it was held that unless the donor reserved to him the power in express words, he had no authority to take back the property from the trustees appointed by him. This case was decided in 1870. Two years before that the Madras High Court expressed the same view in *Gulam Hossein v. Ali Azam* (2). It is true that in this case the Mutwalli was a trustee having hereditary proprietary right and consequently was not removable as an ordinary Mutwalli. Yet an additional reason was given by the Court in support of the decision and that was, that the power of removing the trustee was not reserved by the grantor at the time of endowment. In a recent case decided by the Full Bench of the Oudh Chief Court (*Vide Musammat Rahiman v. Musammat Baqridan* (3) one of the questions referred to the Full Bench was "Whether any change in the terms of the wakf or in the personnel of the Mutwallis can be made by the wakif where no such power has been reserved by him in the deed of wakf, after the wakf had been completed?" The Judges held that it was settled law that a wakif was not under the Mahomedan law empowered to make an alteration in the terms of the wakf unless he reserved such powers to himself. It is not, we think, proper in the face of these clear authorities to go back upon the views which have been accepted in India since the days of *Fatawa Alamgiri*, merely on an abstract discussion of the relative authority of the two great exponents of Hanafi Law. The result, therefore, is that the appeal is allowed, the decision of Henderson, J. is set aside, and that of the Courts below restored. The plaintiff will have a decree in terms of that made by the trial Court and will have costs of all Courts.

Ellis, J. I agree.

s. c.

*Appeal allowed.*

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(1) (1870) 2 N. W. P. H. C. R. 420.

(2) (1868) 4 M. H. C. R. 44.

(3) (1936) I. L. R. 11 Luck. 735 (F. B.).

*Before Mr. Justice Mukherjee and Mr. Justice Ellis.*

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MOHESH CHANDRA SHAHA  
AND OTHERS

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ABDUL GOFUR CHOWDHURY  
AND OTHERS.\*

*Bengal Agricultural Debtors Act (VII of 1936), sections 40, 40A, 40A (5)—Application before Debt Settlement Board—Reference by Board to Appellate Officer, whether notice under section 34 be issued—Appellate Officer adjudged applicant not to be a debtor and hence notice under section 34 not necessary—Review by Board—Applicant a debtor—Award—Review before Appellate Officer dismissed—Petition of Revision before District Judge under section 40A—Proceedings by Board declared ultra vires by District Judge—Suit by applicant for declaration that District Judge's order is null and void—Such suit, if lies—Petition of review before Appellate Officer, though not in form appeal, if really so—Order passed on such petition, though not one passed on appeal, if revisable by District Judge under section 40A.*

The Debt Settlement Board being a tribunal of special jurisdiction must act within its powers which are limited by the statute under which it was created and so long as it does so, its orders whether right or wrong cannot be challenged except in the manner and to the extent prescribed by the statute.

A Civil Court would have the authority to investigate the question as to whether a special or a subordinate tribunal has acted within the limits of its jurisdiction.

*The Secretary of State represented by the Collector of South Arcot v. Mash & Co.* (1) referred to.

But the special tribunal might be invested by the legislature with exclusive jurisdiction to determine its own authority in certain matters, and where it is so invested, the jurisdiction of the Civil Court must be deemed to have been taken away to that extent.

Section 40A of the Bengal Agricultural Debtors Act enables a District Judge to revise any order right or wrong made by the Appellate Officer within or without jurisdiction and that the section is not confined merely to orders made by the Appellate Officer on appeal.

\* Appeal from Appellate Order No. 179 of 1943, against the order of P. C. Roy Esq., Additional District Judge of Zillah Tipperah at Comilla, dated 5th February, 1943, reversing the order of A. B. Mullick Esq., Subordinate Judge, 1st Court, Comilla, dated 29th April 1942.

(1) (1940) 44 C. W. N. 709.

Although the District Judge set aside not merely the order of the Appellate Officer but that of the Debt Settlement Board as well, he cannot be said to have acted without jurisdiction even if his order be not in conformity with the provisions of section 40A (5) of the Bengal Agricultural Debtors Act.

Though the petition for review of the order of the Debt Settlement Board presented to the Appellate Officer was not in the form of a memorandum of appeal as contemplated by section 40(1) (d) of the Bengal Agricultural Debtors Act, yet it was in substance an appeal to the Appellate Officer and he should be presumed to have acted within his jurisdiction and not in excess of it.

If an order of the inferior Court is without jurisdiction, it is capable of being revised by a superior authority in the same way as an order made with jurisdiction.

Appeal by Creditors Defendants.

Suit for declaration that the order of the District Judge in revision in a case under the Bengal Agricultural Debtors Act was null and void.

The material facts will appear from the judgment.

*Messrs. Upendra Kumar Roy and Abani Kanta Roy* for the Appellants.

*Messrs. Gopendra Nath Das and Ajit Kumar Dutta* for the Respondents.

The judgment of the Court was delivered by

**Mukherjea, J.:**—This appeal is on behalf of the defendants and it arises out of a suit commenced by the plaintiff for a declaration that an order made by the District Judge of Tippera under section 40(A) of the Bengal Agricultural Debtors Act in Revision Case No. 123 of 1941 was *ultra vires* of the said Act and as such was null and void.

The material facts are not in controversy and may be stated as follows: In the year 1937, the plaintiff Abdul Gofur Chowdhury presented an application before the Debt Settlement Board within Panchthubi Union for the settlement of his debts due to several creditors who have been made defendants Nos. 1 to 9 in the suit. The application was registered as Case No. 14 of 1937 of the Board. On the 6th September, 1937, the Board made a reference to his Sub-divisional Officer at Comilla, who was the Appellate Officer at that time, regarding the issue of a notice under section 34 of the Bengal Agricultural Debtors Act which was prayed for by the plaintiff. The Sub-divisional Officer made an order on the 22nd September,

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1937, holding that the appellant was not a debtor within the meaning of the Bengal Agricultural Debtors Act and consequently no notice should issue under section 34 of the Act. The Board, however, reviewed the said order of the Appellate Officer, and on the 9th January, 1938, held that Abdul Gofur Chowdhury was a debtor and consequently was entitled to relief under the Bengal Agricultural Debtors Act. The debts were then determined and settled under the provisions of the Act, and eventually an award was made on the 2nd March, 1941.

There was no appeal by any of the creditors against this award. It appears that one Bisseswar Chatterjee was a creditor of the plaintiff who died pending the proceedings before the Debt Settlement Board, and his sons and heirs figure as defendants Nos. 7 and 8 in the suit. Soon after the award was made, an officer acting under the executor to the estate of Bisseswar Chatterjee applied to the Debt Settlement Board for copies of the orders made by it in the above mentioned case, but his application was refused. Thereupon on the 29th April, 1941, another officer of the executor, named Atul Behari De, filed a petition before the Appellate Officer at Comilla complaining of the refusal of the application for copies by the Debt Settlement Board and praying either that the Board might be directed to grant him the copy of the order, or, in the alternative, the records might be called for and he might be informed of the order actually made by the Debt Settlement Board. This petition was registered as Miscellaneous Case No. 63 of 1941. On the 1st May, 1941 Atul put in another petition before the Appellate Officer alleging that the Debt Settlement Board refused to entertain the application for review which was filed by another officer of the estate of Bisseswar Chatterjee and praying that the review petition might be accepted and the order of the Debt Settlement Board set aside. This application was registered as Miscellaneous Case No. 66 of 1941. Both these matters were heard together and decided on the 26th July, 1941. The first application was allowed and the Debt Settlement Board was directed to grant copies of the order to the party, while the second application was dismissed as being filed too late. The order made on the second application is as follows: "Heard pleader. I find no reason to review a case which has been dismissed long ago. Return the court fees."

Against both these orders a revision petition was filed before the District Judge at Tippera under section 40(A) of the Bengal Agricultural Debtors Act. The learned District Judge, by his order,

dated the 11th November, 1941, set aside the entire proceeding before the Debt Settlement Board including the award. It was held by the District Judge that the Debt Settlement Board had no powers to act beyond the order of the Appellate Officer made on the 22nd September, 1937, and there was a gross failure of justice in the proceedings of the Board.

The plaintiff has now brought this suit for a declaration that the above order of the District Judge was without jurisdiction and hence null and void.

The suit was resisted by the defendants Nos. 3, 5, 6, 7, 10 and 12, and their contentions *inter alia* were that the suit was not maintainable in the present form, and that the order of the District Judge was quite within his jurisdiction and was binding on the parties to the proceedings.

The Trial Court dismissed the suit holding that the order of the District Judge was not a nullity and that the suit was barred by the provisions of section 40(6) of the Bengal Agricultural Debtors Act. On appeal, the learned Additional District Judge of Tippera reversed the decision of the Trial Court and sent the case back in order that the other issues which were left undecided by the Subordinate Judge might be disposed of in accordance with law. It is against this order of remand that the defendants have come up on appeal to this Court.

We may state at the outset that we do not dispute the general proposition of law enunciated by the learned Additional District Judge that a Debt Settlement Board being a tribunal of special jurisdiction, its powers are limited by the statute under which it was created. The tribunal must act within its powers and so long as it does so, its orders,—whether right or wrong,—cannot be challenged except in the manner and to the extent prescribed by the statute. Ordinarily, a Civil Court would have the authority to investigate the question as to whether a special or subordinate tribunal has acted within the limits of its jurisdiction. Vide *The Secretary of State represented by the Collector of South Arcot v. Mash & Co.* (1). But this rule must be taken subject to the limitation that the special tribunal might be invested by the Legislature with exclusive jurisdiction to determine its own authority in certain matters, and where it is so invested, the jurisdiction of the Civil Court must be deemed to have been taken away to that extent.

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Now, the Court of appeal below has in the present case negatived almost all the grounds on which the order of the District Judge made under section 40(A) of the Bengal Agricultural Debtors Act was challenged by the plaintiff as being *ultra vires* and without jurisdiction; and he has held,—and, in our opinion quite rightly,—that section 40 (A) of the Bengal Agricultural Debtors Act enables a District Judge to revise *any* order made by the Appellate Officer, and that the section is not confined merely to orders made by the Appellate Officer on appeal. He has also held rightly that although the District Judge set aside not merely the order of the Appellate Officer but that of the Debt Settlement Board as well, he cannot be said to have acted without jurisdiction even if his order be not in conformity with the provisions of section 40(A) (5) of the Bengal Agricultural Debtors Act.

The learned Additional District Judge, has held, however, that the petition presented to the Appellate Officer by Atul Behari De on the 1st May, 1941, cannot be treated as a memorandum of appeal complaining of abuse of powers by the Debt Settlement Board as contemplated by section 40 (1) (d) of the Bengal Agricultural Debtors Act. The application purported to be one for review of the order of the Debt Settlement Board, and under section 44(b) of the Bengal Agricultural Debtors Act, the Appellate Officer was not competent to entertain such an application at all. As the Appellate Officer had no jurisdiction to entertain it, and as his order was without jurisdiction, the order of the District Judge on the basis of that proceeding must also be deemed to be *ultra vires* and without jurisdiction.

Despite the very able and careful judgment of the learned Additional District Judge, we regret to say that we cannot agree with this last portion of his judgment. It seems to us, in the first place, that though the petition of Atul Behari De was not in the form of a memorandum of appeal filed under section 40 of the Bengal Agricultural Debtors Act, it was in substance an appeal to the Appellate Officer complaining of the failure on the part of the Board to perform its functions under the Act. As under the law, an appeal would lie to the Appellate Officer in such circumstances, the Appellate Officer, in our opinion, should be presumed to have acted within his jurisdiction and not in excess of it. But even if we assume that the Appellate Officer had no jurisdiction to make any order on that petition, that by itself would not oust the jurisdiction of the District Judge

under section 40(A) of the Bengal Agricultural Debtors Act. As the learned Additional District Judge has himself pointed out, section 40(A) of the Bengal Agricultural Debtors Act is not confined to orders made by the Appellate Officer on appeal. It applies to all orders made by the Appellate Officer, be they right or wrong, and within or without jurisdiction.

It is a settled principle of law that when the order of an inferior tribunal is revisable by a superior authority, the authority of the revising court is not confined to orders made by the subordinate Court within the limits of its own jurisdiction. If an order of the inferior Court is without jurisdiction, it is capable of being revised in the same way as an order made with jurisdiction.

The result, therefore, is that, in our opinion, the plaintiff is not entitled to a declaration that the order of the District Judge was without jurisdiction and hence null and void. We agree with Mr. Das that the order of the District Judge under section 40(A) of the Bengal Agricultural Debtors Act might not have been made in strict conformity with the provisions of that section, and instead of setting aside the decision of the Debt Settlement Board himself, the proper procedure ought to have been to send the case back for rehearing with proper instructions to the Appellate Officer, but these are matters which do not affect the jurisdiction of the District Judge, and hence a Civil Court is not competent to pronounce the order of the District Judge to be a nullity on that ground.

The result, therefore, is that this appeal is allowed. The judgment of the Lower Appellate Court is set aside and that of the Court of First Instance restored and affirmed. The defendants will have their costs in the Courts below. We make no order as to costs in this Court.

Ellis, J. : I agree.

S. C.

*Appeal allowed.*

Civil

1945.

Moheeb Chandra  
Shaha

v.

Abdul Gafur  
Chowdhury.

*Mukherjee, J.*

Before Mr. Justice B. K. Mukherjee and Mr. Justice  
T. H. Ellis.

SREE SREE ISWAR RADHA BALLAV JEW  
THAKUR

THROUGH HIS SHERBATT MAHARAJADHIRAJ  
UDOY CHAND MAHATAB  
BAHADUR

CIVIL

1945.

March, 21, 23, 29.

v.

MAHIMA RANJAN ROY AND OTHERS.\*

*Bengal Tenancy Act (Act VIII of 1885), section 168(1) (a) Proviso—Decree for rent of a putni tenure obtained by landlord for 1331-1334 B. S.—Execution—No realisation—Putni put up for sale in execution of a certificate case started by landlord for rent of subsequent period and purchased by landlord—Fresh execution case started on the decree obtained by landlord for 1331-1334 B. S. for attachment and sale of certain property of judgment-debtor other than the tenure in arrear—Execution, if can proceed—"Application" referred to in proviso, meaning of—Proviso, when applicable.*

The application for execution mentioned in the proviso under section 168A (1) (a) does not refer to the first application for execution of the decree but to the particular application for attachment and sale of the properties of the judgment-debtor other than the tenure in arrear which but for the proviso would be barred under section 168A (1) (a) of the Bengal Tenancy Act.

Views of Roxburgh, J. in *Swarna Manjari v. Fakir* (1) adopted.

*Atul Chandra v. Upendra Narayan* (a) explained.

*Amritlal v. Manindranath* (3) applied.

To attract the proviso to section 168A (1) (a) of the Bengal Tenancy Act it is not necessary to show that the tenancy expired after the section 168A came into force.

Views of Roxburgh, J. in *Swarna v. Fakir* (1) dissented from.

*Atul Chandra v. Upendra Narayan* (a) re-affirmed.

*Amritlal v. Manindranath* (3) adopted.

The proviso to section 168A (1) (a) of the Bengal Tenancy Act will have no application where the landlord had purchased the tenure in execution of the very same decree for the balance due under which the subsequent execution case was started. In such a case the landlord cannot proceed against the other properties of the judgment-debtor, i. e. to say, properties other than the tenure.

\* Appeal from Appellate Order No. 289 of 1943, against the order of J. Gupta, Esq., District Judge, Birbhum, affirming the order of D. N. Basu, Esq., Subordinate Judge, Birbhum.

(1) (1944) 48 C. W. N. 120.

(a) (1942) 5 C. L. J. 267; 46 C. W. N. 684.

(3) S. M. A. 243 of 1943 (Per Khundkar & Biswas, JJ.), decided on 16th March, 1945.

*Uday Chand v. Kurooram* (1) referred to.

Where however a landlord having purchased the tenure in execution of a later rent decree proceeds against judgment debtor's other properties in execution of an earlier rent decree the landlord can avail himself of the proviso and if there is merger the execution will proceed.

Appeal by the Decree-holder.

Application for execution of a rent decree by attachment and sale of certain property of judgment-debtor other than the tenure in arrears.

Objection under section 168A of Bengal Tenancy Act.

The material facts will appear from the judgment.

*Messrs. Purushottam Chatterjee* and *Amiya Kumar Mukherjee* for the Appellant.

*Mr. Apurba Dhan Mukherjee* for the Respondents.

The judgment of the Court was as follows:—

**Mukherjee, J.:**—This appeal is on behalf of the landlord decree-holder and arises out of a proceeding in execution of a rent decree. The appellant as plaintiff instituted a suit against the respondents in the Court of the Subordinate Judge of Birbhum (being R. S. No. 10/28) for recovery of arrears of rent for the years 1331-1334 B. S. due in respect of a Putni held by the defendants under the plaintiff, and obtained a decree on 16th December, 1929. The decree was put (?) into execution in 1930, but nothing was realised in course of that execution proceeding which was finally disposed of on 2nd May, 1932. In the meantime further arrears of rent having accumulated, the landlord started a certificate case under the Public Demands Recovery Act, against the same tenant, and in execution of the certificate the putni was put up to sale and purchased by the landlord on 27th April, 1932. The sale was confirmed on 2nd July, 1932 and the landlord purchaser took delivery of Khas possession soon after. Thereafter several unsuccessful attempts were made by the landlord decree-holder to execute the decree obtained in R. S. No. 10/28, and finally the present execution case was started on 2nd December, 1940, in course of which the decree-holder applied for attachment and sale of certain property belonging to the judgment-debtors other than the tenure in arrears. The judgment-debtors took objection under section 168(A) Bengal Tenancy Act contending inter alia, that as the defaulting tenure had already been sold, the landlord could not proceed against any other property of the judgment-debtors.

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1945.

Sree Sree Iswar  
Radha Ballav Jew  
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Mahima Ranjan Roy.

March, 29.

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1945.

Sree Sree Iswar  
Radha Ballav Jew  
Thakur  
v.  
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Mukherjee, J.

The trial Judge gave effect to this contention and dismissed the execution case. On appeal this judgment was affirmed by the District Judge of Birbhum. The landlord decree-holder has now come up on appeal to this Court.

The position taken up by the decree-holder is that as the defaulting tenure was purchased by the landlord in execution of a certificate under the Public Demands Recovery Act and made Khas, the tenure had expired by being merged in the superior interest of the proprietor, and consequently the latter was at liberty to proceed against other properties of the judgment-debtor under the proviso to section 168A (1) (a) Bengal Tenancy Act.

The contention was overruled by the Court of appeal below on the ground that the proviso would only be attracted if the tenure expired before the first or initial application for execution was made. As in the present case there were previous applications for execution of the decree when the tenure was in existence and could be proceeded against, the landlord decree-holder was not entitled to avail himself of the benefit of the Proviso. In taking this view the learned District Judge relied upon a decision of a division bench of this Court, which is reported in *Atul Chandra v. Upendra Narayan* (1) and to which one of us was a party. In that case the landlord decree-holder proceeded initially against the tenure in arrears, for realisation of his decretal dues, and the tenure was put up to sale and purchased by himself. The sale proceeds being insufficient to wipe off the decree, he started a fresh proceeding in execution of the same decree for recovery of the balance and sought to attach and sell other properties belonging to the judgment-debtor. It was held by this Court that he could not do so, and the Proviso was not attracted to a case where the tenure was sold and purchased by the landlord in execution of the same decree, for the recovery of unsatisfied balance of which the subsequent proceeding in execution, by attachment and sale of other properties, was started. The words "before an application is made for execution of such a decree" occurring in the proviso were construed to mean and refer to the original or initial application for execution by the landlord, and not to any subsequent one started after he himself purchased the defaulting tenancy in part satisfaction of his decree.

It is to be noticed, that in *Atul Chandra's* case (1), the purchase by the landlord in execution of the rent decree was prior to January, 1941 when section 168A of the Bengal Tenancy Act came into force,

(1) (1942) 75 C. L. J. 267; 46 C. W. N. 684.

and it was argued on behalf of the respondent that the proviso to section 168A (1) (a) Bengal Tenancy Act could be invoked only when the tenancy expired after the passing of section 168A. This contention was not accepted by the Division Court, primarily on the ground that the language of sub-section (a) of the section 165A Bengal Tenancy Act gave a retrospective effect to the provision of the section, to the extent indicated therein and a case where the landlord after putting up to sale the defaulting tenancy, before the passing of the section, proceeded against other properties of the judgment-debtor which were attached but not sold, when the section came into force, would come within the purview of sub-section (2).

Mr. Purusottam Chatterjee appearing for the appellant has contended (2) before us that there is no reason why the application referred in the proviso to section 168A (1) (a) Bengal Tenancy Act should be taken to mean only the first or initial application, and he has invited us to reconsider the matter particularly as different views have been expressed on this point in subsequent pronouncements of this Court. This identical question came up for consideration before a Division Bench of this Court consisting of Roxburgh and Blank, JJ in the case of *Swarnamunjuri v. Fakir* (1). There also the landlord in execution of a rent decree realised a portion of the decretal dues by sale of the defaulting tenancy prior to January, 1941 when section 168A Bengal Tenancy Act came into force. He applied in 1941 for execution in respect of the balance of his dues by attachment and sale of the properties of the judgment-debtor who contended that section 168A which came into operation in the meantime operated as a bar to the proceedings. This contention was given effect to by the Courts below and the execution case was dismissed. It was contended on behalf of the landlord appellant in this Court that as the tenure ceased to exist by merger as a result of his own purchase in the earlier execution proceeding the case came within the proviso to sub-section (1) (a) of section 168A Bengal Tenancy Act. Thus the facts were on all fours with those of *Atul Chandra v. Upendra Narayan* (2). Blank, J. who was a party to the judgment in *Atul Chandra's* case (2) was of opinion that the appeal should be dismissed on the authority of that decision. Roxburgh, J. agreed in dismissing the appeal but on a different ground. He was of opinion that the word "expire" occurring in the proviso to section 168A (1) (a), Bengal Tenancy Act, refers to expiry after the

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(1) (1944) 48 C. W. N. 220.

(2) (1942) 75 C. L. J. 267; 46 C. W. N. 684.



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Mukherjee, J.

commencement of the Bengal Tenancy Amendment Act of 1940, whereby section 168A was introduced, and consequently the proviso could not be attracted to a case, where the sale took place prior in January, 1941. Roxburgh, J. further held that the application for execution referred to in the proviso did not mean the first or initial application, but the particular application for execution against other properties of the judgment-debtor which would have been barred under sub-section (1) (a) of section 168A but for the operation of the proviso. Thus according to Roxburgh, J. the decision in *Atul Chandra v. Upendra* (1) was correct, not because the application for execution in the case was a subsequent application but because the tenancy had expired prior to the introduction of section 168A in the Bengal Tenancy Act.

It may be pointed out here, that the view taken by Roxburgh, J. is of no assistance to the appellant in the case before us, as here also the sale under the certificate proceeding took place prior to January, 1941.

The matter came up for consideration again in the case of *Lakhan Chandra v. Birendra* (2) which was heard and decided by Mitter and Sharpe, JJ. In this case a rent decree was obtained by the landlord in 1932. The decree was executed several times and certain monies were realised. On 5th June, 1940 there was an adjustment of the decree by which the decree-holder agreed to accept a sum of Rs. 3639, in full satisfaction of the decree, and the amount was payable in certain instalments. The judgment-debtor paid the first instalment in proper time, but there was default in the payment of subsequent instalments. On 15th May, 1941 the Putni was sold under Regulation VIII of 1819 for recovery of arrears of rent not included in the decree mentioned above, and it was purchased by the landlord. On 14th June, 1942 the decree-holder applied for execution of the balance due under the rent decree of 1932. Objections were raised by the judgment-debtor under section 168A Bengal Tenancy Act. The Court below overruled the objection being of opinion that the tenure having expired by merger by reason of the purchase by the landlord at the Putni sale the proviso was attracted. The case of *Atul Chandra v. Upendra* (1) was relied upon by the judgment-debtor, but it was held that as the decree was adjusted in 1940 and a new decree passed, the application for execution in 1942 was the first and

(1) (1942) 75 C. L. J. 267; 46 C. W. N. 684.

(2) (1944) 48 C. W. N. 837.

initial application in connection with the adjusted decree, and consequently came within the principle enunciated in *Atul Chandra's* case (1). On second appeal to this Court, it was held that the adjusted decree of 1942 could not be regarded as a new decree and the application for execution in 1942, was not the original or the first application. It was held however, following the opinion of Roxburgh, J. in *Swarna Munjari v. Fakir* (2) that the application referred to in the Proviso, meant the particular application for execution against other properties of the judgment-debtor which would have been barred but for the proviso. As in this case the tenancy expired after the passing of the Bengal Tenancy Amendment Act of 1940 the question whether the proviso would apply, when the expiry was prior to the Act was left open. All the three cases mentioned above were considered and discussed by Khundkar and Biswas, JJ. in their recent decision in *S. M. A. No. 248 of 1943 Amrita Lal Chatterjee v. Manindra Nath Biswas* (3) (decided on 16th March, 1945). In this case a rent decree was obtained in 1930. A number of execution cases were started between 1931 and 1939, all of which proved infructuous for one reason or another. In 1935, the superior touzi was sold for arrears of revenue and as result of that the tenure in arrears was extinguished by annulment. In 1942, the landlord proceeded to execute the decree, by attachment and sale of the properties belonging to one set of judgment-debtors and he was met with the objection that under section 168A (a) such execution was not maintainable. The first Court disallowed the objection but the lower appellate Court gave effect to it. Against the decision the landlord came up on a second appeal to this Court. The appeal was allowed and the Court accepted the view of Roxburgh, J. that the application for execution mentioned in the proviso under section 168A (a) referred not to the first application for execution of the decree, but to the particular application for attachment and sale of the properties of the judgment-debtor other than the tenure in arrears which but for the proviso would be barred under section 168A (1) (a). The learned Judges held that the decision in *Atul Chandra v. Upendra Narayan* (1) was correct, and was determined in accordance with the principles underlying section 168A Bengal Tenancy Act, but it was not necessary for purposes of that decision to go so far as to say that the application for execution contemplated by the proviso must be the first or original application. After quoting a passage in the judgment in *Atul Chandra's* case (1) where the words "before an

(1) (1942) 75 C. L. J. 267; 46 C. W. N. 684.

(2) (1944) 48 C. W. N. 120.

(3) (1945) 49 C. W. N. 389.

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application is made for executing of such a decree" occurring in the proviso to section 168A (1) (a) were interpreted to mean the first or initial application the learned Judges observed as follows:—

"We do not think it necessary to go so far as to adopt the view contained in the words just quoted. The actual decision in the case of *Atul Chandra v. Upendra* (1) was that the proviso does not apply when the tenure has been obliterated by reason of the fact that it was previously purchased by the landlord in execution of the very decree for the execution of which the application under consideration is being made. We respectfully agree with this conclusion, and we think that it is in accordance with the principle underlying section 168A, the scheme of which is to protect the other properties of a tenant from an execution for arrears of rent which the landlord could very well levy against the tenancy in respect of which the default occurred. It would follow that if such execution has already been levied by the landlord against the tenancy in default, it would be against the spirit of the provisions embodied in section 168A to permit the landlord to proceed against the other properties of the judgment-debtor for further satisfaction of the self same decree for arrears of rent."

The learned Judges did not accept the view of Roxburgh, J. that the tenancy must expire after the passing of section 168A Bengal Tenancy Act in order that the proviso might be attracted and held that the Legislature intended the provisions of the section to be retrospective at least to the extent indicated in sub-section (2). On a full and careful consideration of the matter we are inclined to agree with the views taken by Khundkar and Biswas, JJ. in the case referred to above. The case of *Atul Chandra v. Upendra Narayan* (1) was in our opinion correctly decided, though it was not necessary for the purpose of deciding the case to lay down as a proposition of law that the application for execution contemplated by the proviso referred only to the first or original application. In this respect we are inclined to adopt the views of Roxburgh, J. which has been accepted by two Division Benches of this Court, in the two cases mentioned above. We cannot however agree with Roxburgh, J. that to bring the proviso into operation, the expiry of the tenancy should occur subsequently to coming into force of section 168A Bengal Tenancy Act. In this point we adhere to the views expressed in *Atul Chandra v. Upendra Narayan* (1), which have been affirmed by Khundkar and Biswas, JJ. On the view we are taking, all the cases referred to above can be held to have been correctly decided,

(1) (1942) 75 C. L. J. 267; 46 C. W. N. 684.

and as we are not disputing the correctness of the actual decision in any one of them, it is not necessary for us to refer the matter to a larger bench. It is true that we are differing from Roxburgh, J. on the question as to when the tenancy should expire for the purpose of bringing the proviso into operation. But that opinion has already been dissented from by a subsequent division bench, and as Mr. Justice Blank did not agree in that opinion the question of referring that question to a Full Bench does not arise. It may be pointed out here that expiry of a tenancy prior to 1941, will be a comparatively rare event as time passes, and the question whether the tenancy was extinguished before or after the amendment of 1940 would have only an academic value in future.

We hold therefore in accordance with the decision of Khundkar and Biswas, JJ. in S. M. A. No. 243 of 1943 (1), that to attract the proviso to section 168A (1) (a) of the Bengal Tenancy Act, it is not necessary to show that the tenancy expired before the section 168A came into force, and the Proviso would apply even if the application for execution was not the first or original application. If however the landlord had purchased the tenure in execution of the very same decree, for the balance due under which the subsequent execution case was started the proviso would have no application. This was exactly the basis of another decision of a Division Bench of this Court. Vide *Uday Chand Mahatab v. Kuroram Mukherjee* (2).

Thus in the circumstances of the present case it must be held that the landlord can avail himself of the proviso to section 168A (1) (a) of the Bengal Tenancy Act. The question whether there has been an extinction of the tenancy by merger has not been actually determined by the Court below.

This appeal therefore will be allowed. The orders of the Courts below are set aside and the case sent back to the Court of first instance in order that this question may be determined on such evidence as the parties might adduce. If the Court finds that there has been a merger, it will direct the execution to proceed. As the Court of appeal below was perfectly justified in basing its decision upon the authority in *Atul Chandra's* case (3), we make no order as to costs in this Court. Further costs will be in the discretion of the Court of first instance.

ELLIS, J. :—I agree.

A. K. D. G.

*Appeal allowed.*

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(1) (1945) 49 C. W. N. 389.

(2) (1944) L. L. R. 1 Calc. 671.

(3) (1942) 75 C. L. J. 267; 46 C. W. N. 684.

*Before Mr. Justice Mukherjee and Mr. Justice  
Akram.*

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June, 8.

BIMALENDU ROY

v.

SHEBAITS OF DEITY GOPAL DEB, KRISHNA  
GOPAL THAKUR, RADHA KRISHNA DEB,  
LAKSHMI JANARDAN  
AND OTHERS.\*

*Estates Partition Act (V B. C. of 1897), section 88, order under—Effect of—  
Section 119 (ii), the procedure under, for setting aside the order—  
When the jurisdiction of Civil Court is excluded—Limitation—Indian  
Limitation Act (IX of 1908), Sch. I Art. 14, applicability of—‘Set aside’,  
implication of.*

The words ‘set aside’ as used in Article 14 of the Indian Limitation Act implies that the order complained of is binding on the plaintiffs unless and until it is set aside and the Article cannot have any application when it is not necessary for the plaintiff to set aside the act or order in order to obtain the relief which he claims.

The Collector exercising his jurisdiction under the Estates Partition Act is not endowed with any authority to decide any question of title which might be raised by a party interested in the proceedings. Section 88 only allows the Deputy Collector to enquire into the question of possession and nothing else.

The right which a person has under the general law of bringing a suit in Civil Court for declaration of title is not in any way affected or curtailed by the Estates Partition Act, and with reference to such suits for declaration of title a co-proprietor is in exactly the same position as a stranger.

*Laloo Singh v. Purna Chander Banerjee* (1); *Fanaki Nath Chowdhry v. Kali Narain Roy* (2); *Kedar Nath Sanyal v. Nareesh Chandra Ghosh* (3); *Sm. M. Ghose v. Sm. M. M. Ghose* (4); *Maharaja Sasi Kanta Acharjee Chowdhury v. Rajendra Kumar Chakravarty* (5) and *Ajodhya Prasad v. Ramakrishnan Singh* (6) referred to.

\*Appeal from Appellate decree No. 1118 of 1940, against the decree of S. K. Sen, Esq., District Judge of Zillah Rungpur, dated 27th March, 1940, affirming the decree of Moulvi Md. Abul Ahsan, Subordinate Judge, Rungpur, dated the 11th of October 1939.

- (1) (1896) I. L. R. 24 Calo. 149.
- (2) (1910) I. L. R. 37 Calc. 662.
- (3) (1930) 52 C. L. J. 247.
- (4) (1927) 33 C. W. N. 1219.
- (5) (1935) 40 C. W. N. 112.
- (6) (1926) I. L. R. 6 Pat. 73.

*Parbati Nath Dutt v. Rajmohan Dutt* (1) distinguished and doubted.

Section 119 of the Estates Partition Act excludes jurisdiction of civil courts only in matters which relate to the mode or determination of the Government revenue or to the details of partition and allotment and it does not oust the jurisdiction of courts in matters involving questions of title.

Where the lands in dispute are revenue-free properties which did not appertain to any revenue-paying estate at all, the partition Collector had no jurisdiction to partition it under the Estates Partition Act.

Appeal by Defendant No. 1.

Suit for declaration of title.

The material facts will appear from the judgment.

*Dr. Radhabenode Pal* and *Mr. Biswanath Mukherjee* (for *Mr. Benoy Krishna Mukherjee*) for the Appellant.

*Messrs. Gopendra Nath Das* and *Dwijendra Krishna Dutt* for Respondents Nos. 1 to 4.

*Mr. Ramaprosad Mookherjee* for Respondent No. 5.

The judgment of the Court was delivered by

**Mukherjee, J.** :—This appeal is on behalf of defendant No. 1, and it arises out of a suit commenced by the plaintiffs as sebaits of four deities, to wit (1) Gopal Deb (2) Krishna Gopal Thakur (3) Radha Krishna Deb and (4) Lakshmi Janardan, for establishment of title of the deities to ten items of property described in the schedule to the plaint, and for permanent injunction restraining the defendants from interfering with their possession. There was also a prayer for confirmation of possession of the idols in respect of the lands in suit and in the alternative for recovery of possession if the plaintiffs were found to have been dispossessed.

There is not much controversy about the material facts which may be shortly stated as follows :—

The plaintiffs in their personal capacity together with defendant No. 1 were the joint owners of Touzi No. 204 of the Rangpur Collectorate. Plaintiff No. 1, Brojendra Kanta Roy Chowdhury, in his personal capacity had 1 anna 12 gandas share in the Touzi ; plaintiffs Nos. 2 and 3, Jyotish Chandra Roy Chowdhury and Salil Kumar Roy Chowdhury, had 3 annas 4 gandas share each in the same capacity while Protiva Bala Dabi Chowdhurani, plaintiff No. 4 in her personal capacity was interested to the extent of 6 annas 8 gandas share in the Touzi ; the balance amounting to 1 anna 12 gandas belonged to defendant No. 1. In 1915 defen-

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dant No. 1 started a proceeding for partition of this Touzi under the provisions of the Estates Partition Act, and this was registered as *batwara* case No. 1 of 1915-16. In course of these proceedings the Partition Deputy Collector made an order under section 88 of the Estates Partition Act on July 11, 1923, directing the inclusion of the ten items of the disputed property in the partition as forming part of Touzi No. 204 of the Rangpur Collectorate. The present plaintiffs, who in their personal capacity were parties to the proceedings, objected to the order on the ground that they were rent-free debutter properties belonging to the idols mentioned above, and did not appertain to any revenue-paying estate. These objections were rejected by the Partition Officer by his order dated March 22, 1934. Eventually, the estate was partitioned and three separate Touzis, to wit, Touzis Nos. 803, 804 were carved out of it and the residuary share remained as Touzi No. 204. Touzi No. 803 was allotted to Protiva Bala, Touzis Nos. 804 and 805 became the property of Salil Kumar and defendant No. 1 respectively; while the residuary estate was allotted to Brojendra and Jyotish. Of the disputed properties, which were included in the partition, items 1 to 5 were allotted to Touzis Nos. 804 and 204, while properties 6 to 10 were made parts of Touzi No. 805. Possession of the different *sakams* was delivered to the different parties on March 29, 1930. Brojendra, Jyotish and Salil had granted a putni in respect of their share to Maharaja Shrish Chandra Nandy, who was made defendant No. 2 in the suit.

The case of the plaintiffs deities is that the properties in suit were really revenue-free debutter properties which were held by them under ancient *taidads* and that the Collector had no jurisdiction to include them within Touzi No. 204 of the Rangpur Collectorate. Even after the final order was made in the partition case, the deities, it is said continue to realise rents from the tenants of the suit lands. Cloud was, however, cast on their title by reason of the defendants having obtained certain rent decrees against certain tenants and this led to the institution of the present suit.

The suit was instituted on March 28, 1936. The Subordinate Judge who heard it gave a decree in favour of the plaintiffs. There were two appeals taken against this decision by the two defendants. They were heard together and the District Judge sent the case back on remand for fresh hearing after taking additional evidence. The suit was heard afresh and the Subordinate Judge decided it again in favour of the plaintiffs. The title of the deities

was declared with respect to all the items of the property with the exception of two small blocks and they were held entitled to recover possession from the defendants. Against this decision defendant No. 1 alone took an appeal to the court of the District Judge of Rangpur and the appeal was confined to the plots Nos. 6 to 10 only in which defendant No. 1 was interested. The learned District Judge dismissed the appeal and affirmed the decision of the trial Judge. It is against this appellate decree that the present appeal has been filed by defendant No. 1.

Dr. Pal who appears in support of the appeal has contended before us, primarily, that there being an adverse order against the plaintiffs made by the Partition Officer under section 88 of the Estates Partition Act that order would stand, unless it was set aside by a suit as is contemplated by the proviso (ii) to section 119 of the Estates Partition Act; and such a suit has got to be instituted within one year from the date of the order under Article 14 of the Indian Limitation Act. As more than twelve years had already elapsed from the date of the order any suit under the proviso to section 119 of the Estates Partition Act was barred and no other remedy was open to the plaintiffs as laid down in the section itself. He has further argued that in any event with regard to the properties Nos. 9 and 10 no title could accrue to the plaintiffs on the basis of the *taidad* upon which they rested their claim.

Now, section 119 of the Estates Partition Act provides *inter alia* that an order made under section 88 which comes within chapter IX of the Act cannot be contested or set aside by suit in any court or by any means other than those expressly provided in the Act. Proviso (ii) further lays down that any person who is aggrieved by an order made under section 88, may bring a suit in a court of competent jurisdiction to modify or set aside such order. Under Article 14 of the Indian Limitation Act the period of limitation provided for a suit to set aside an act or an order of an officer of Government in his official capacity is one year from the date of the act or order. The words 'set aside' as used in Article 14 of the Indian Limitation Act clearly implies that the order complained of is binding on the plaintiffs unless and until it is set aside and the Article cannot have any application when it is not necessary for the plaintiff to set aside the act or order in order to obtain the relief which he claims. The question, therefore, narrows down to this—whether the plaintiffs were bound to set aside the order under section 88 of the Estates Partition Act

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before they could obtain any relief by way of declaration of title to or recovery of possession of the properties in suit. In our opinion the answer to this question should be given in the negative.

In the first place, the present plaintiffs were not parties to the partition proceedings at all. Section 88 of the Estates Partition Act lays down: If a dispute or doubt is found to exist as to whether any land forms part of a parent estate, the Deputy Collector shall, after due notice to the parties interested, enquire into the fact of possession, and shall report his conclusion to the Collector, who will act in one of the various ways specified in the section. No notice, it seems, was served upon the deities in the present case, and as strangers to the proceedings they could not be affected in any manner by the decision which may be arrived at by the revenue authorities for the purpose of partition between the proprietors. It is an accident that name of the proprietors happened to be sebaits of the deities as well, but they appeared before the Revenue Officer in the character of proprietors and not otherwise though they might have argued for exclusion of the properties from partition on the ground of their being revenue free properties belonging to certain deities. There was no real adjudication upon the claim of the deities and there is no order binding on them, which it is necessary to be set aside. The decision of this Court in *Laloo Singh v. Purna Chander Banerjee* (1) is one of the earliest authorities on this point.

In this case by reason of an order made under section 116 of the old Estates Partition Act, which corresponds to section 88 of the present Act, certain lands were included in the defendants' mouza and the plaintiffs who were dispossessed from these lands brought a suit for declaration of title to and recovery of possession of the same nearly eleven years after the order was made. It was held that Act 14 of the Indian Limitation Act did not apply and that the plaintiffs were not bound to institute a suit before they were actually dispossessed. The case of *Parbati Nath Dutt v. Rajmohan Dutt* (2), upon which a considerable stress is laid by Dr. Pal is, in our opinion, distinguishable. The plaintiff in that case, who was a party to the partition proceeding, wanted certain lands to be excluded on the ground that they belonged exclusively to him in howla right. This objection was overruled and he brought a suit after more than one year had elapsed from the date of the order.

(1) (1896) I. L. R. 24 Calo. 149.

(2) (1901) I. L. R. 29 Calo. 367.

It was held that the objection preferred by him must be taken to have been raised in the capacity of a howladar and as the suit was filed by him in the same capacity it was barred under Article 14 of the Indian Limitation Act.

In the present case the co-sharers did not claim title to the disputed lands in another right, but contended that they belonged to other persons altogether, namely, the deities. We may point out that the decision in *Parbati Nath Dutt v. Rajmohun Dutt* (1) is hardly reconcilable with the view that has been taken in a long series of cases since then. It has been held by this Court in quite a large number of cases that the Collector exercising his jurisdiction under the Estates Partition Act is not endowed with any authority to decide any question of title which might be raised by a party interested in the proceedings. Section 88 only allows the Deputy Collector to enquire into the question of possession and nothing else. The right which a person has under the general law of bringing a suit in Civil Court for declaration of title is not in any way affected or curtailed by the Estates Partition Act, and with reference to such suits for declaration of title a co-proprietor is in exactly the same position as a stranger. [Vide *Janaki Nath Chowdhury v. Kali Narain Roy* (2); *Kedar Nath Sanjal v. Naresk Chandra Ghosh* (3); *Sm. M. Ghosh v. Sm. M. M. Ghosh* (4); *Maharaja Sasi Kanta Acharjee Choudhury v. Rajendra Kumar Chakravarty* (5).] The same view has been taken by the Patna High Court in *Ajodhya Prasad v. Ramkhlawan Singh* (6). The position, therefore, is that section 119 of the Estates Partition Act excludes jurisdiction of Civil Courts only in matters which relate to the mode or determination of Government revenue or to the details of partition and allotment, and it does not oust the jurisdiction of the Courts in matters involving questions of title.

In the case before us the plaintiffs did not seek to challenge the propriety of the allotments in any way; nor has it been contended before us that any question of Government revenue is involved in this case. The case of the plaintiffs simply is that the lands in suit are outside Touzi No. 204 and consequently they cannot be partitioned amongst the proprietors of the said Touzi. In

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(1) (1901) I. L. R. 29 Calc. 367.

(2) (1910) I. L. R. 37 Calc. 662.

(3) (1930) 52 C. L. J. 247.

(4) (1927) 33 C. W. N. 1219.

(5) (1935) 40 C. W. N. 112.

(6) (1926) I. L. R. 6 Pat. 73.

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our opinion no order made by the Partition Deputy Collector in this connection is binding on the deities, and consequently they are not obliged to have it set aside.

Lastly, we agree with Mr. Das that apart from any question of title amongst the parties *inter se*, as the Courts below have held concurrently that the lands in dispute are revenue-free properties which did not appertain to any revenue-paying estate at all the Partition Collector had no jurisdiction to partition it under the Estates Partition Act. The order made under section 88 of the Estates Partition Act is, therefore, a nullity out and out and it can be ignored and need not be set aside by any suit or proceeding.

Our conclusion, therefore, is that the suit as framed is quite competent and it is not barred under Article 14 of the Indian Limitation Act.

The other ground raised by Dr. Pal is absolutely without any substance. It is contended that the *taidad* under which the plaintiffs claim title to the properties Nos. 9 and 10 of the plaint schedule shows that the grant was in favour of a deity named Lakshmi Narayan, but Lakshmi Narayan does not figure as a plaintiff in this suit. No such contention was raised at any stage of the suit or proceeding and the finding of the Courts below is that the income of the property has been appropriated all along for the Seba and worship of the plaintiffs deities. Admittedly, Lakshmi Janardan is one of the plaintiffs in this suit and had the question been raised in the proper form it might have been proved by the plaintiffs that Lakshmi Janardan is the same as Lakshmi Narayan, as mentioned in the *taidad*.

In our opinion the appeal fails and is dismissed with costs.

Akram, J. :—I agree.

S. C.

*Appeal dismissed with costs.*

*Before Mr. Justice N. A. Khunhar.*

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*Ejectment—Lease, expiry of—Trespasser—Sub-lease by lessee—Liability to deliver vacant possession—Estoppel, waiver, acquiescence—Evidence to show that before lease possession was not vacant—Ignorance as to legal liability—Prayer for damages with claim for mesne profits—Receiver, position of—Prayer for damages during the possession of Receiver.*

A Receiver does not hold for the benefit only of the party at whose instance he is appointed. The Receiver is an officer of the Court, and though he holds for the ultimate benefit of the parties to the suit, the property, when it comes into his possession, becomes "in custodia legis":

*Kartick Nath Pandey v. Padmanand Singh* (1) and other cases.

An act which may amount to waiver or acquiescence by one of the trustees when performed in his individual capacity cannot, when done by him as trustee, bind the trust estate unless it had the concurrence of his co-trustee.

Ordinarily ignorance in regard to one's legal liability or the fact that one acted from motives of prudence and foresight cannot afford a defence.

By an indenture of lease dated May 6, 1932, certain premises in Camero Street, Calcutta were demised by trustees, plaintiff and defendant No. 2 for a period of 7 years to defendant No. 1: The lease had retrospective effect from 1st September, 1931. On the expiry of the lease, the trustees demanded possession of the premises, but defendant No. 1 could not give vacant possession as there were sub-tenants on the land. On November 7, 1938, the present suit was instituted and on 10th November, 1938 a Receiver appointed at the instance of the plaintiff, took possession.

The case for the plaintiff was that the first defendant was liable to deliver vacant possession of the premises when the lease expired; that his offer to give what is called symbolic possession by asking the sub-tenants to attorn to the lessors was not in law a sufficient discharge of this liability; that his profession of willingness to surrender possession was belied by his conduct in continuing to collect rents from the sub-tenants after the 31st August, 1938; that by collecting rents in this way, the first defendant committed overt acts of trespass, that the plaintiff was compelled to ask for the appointment of a Receiver in order to prevent the first defendant from prolonging his trespass and from continuing to intercept the rents payable by the sub-tenants; that the first defendant was liable to compensate the lessor for any loss of profit to them which arose out of defendant No. 1's conduct between the 31st August, 1938 and the 10th November, 1938.

\* Original Civil Suit No. 1806 of 1938.

(1) (1885) I. L. R. 11 Cal. 496 (498).

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The plaintiff sued for recovery of possession of the said premises, for mesne profits and damages against the first defendant for the period commencing on 1st September, 1938, that is, upon expiry of the lease until the possession is decreed and the Receiver discharged.

*Held*, that the defendant No. 1 could not be allowed to call evidence to show that some of the sub-tenants who were in occupation on 1st September, 1938, were there before 1st September, 1931.

That the plaintiff along with defendant No. 2 was entitled to recover mesne profits from defendant No. 1, up to 9th November, 1938, who should be considered as trespasser from 1st September, 1938 to 9th November, 1938, and damages thereafter, the measure of both of which is, the rent which the latter was paying under the lease.

The trustees' powers being joint, no act performed by one trustee in respect to it, without the consent of the other, could bind the estate.

That the right of the trustee lessors to recover vacant possession was not renounced by the willingness of only one of them to take delivery of possession in some other mode. The liability of the first defendant to deliver vacant possession remained and it had never been discharged and on the 1st September, 1938, the first defendant became trespasser.

An invasion of lessors' right to recover vacant possession was a wrong to which the doctrine *Actus non, facit reum, nisi mens sit rea*\* cannot apply.

That the ousting of defendant No. 1 from possession, even if it operated to terminate his trespass, did not have the effect of passing possession to the plaintiff inasmuch as the Receiver could in no sense be regarded as the plaintiff's agent.

Order 20 Rule 12 of the Code of Civil Procedure does not prohibit additional reliefs which a plaintiff who seeks to recover possession of immovable property may wish to ask for.

Order 2 Rule 4 is to be read with Order 2 Rule 3 of the Code of Civil Procedure: *Gyana Sambandha Pandara Sannadhi v. Kandasami Tambirani* (1).

The compensation for loss which the plaintiff claimed, in respect of the period covered by the Receiver's possession, might be caught up under clause (b) of Order 2 Rule 4 of the Code of Civil Procedure, as it arose out of the breach of the contract to surrender vacant possession. In any event, it is within the intention of clause (c) of Rule 4 of Order 2, "claims in which the relief sought is based on the same cause of action."

\* Meaning—The act itself does not make a man guilty, unless his intention were so. The intent and act must both concur to constitute the crime—*Desai*.

(1) (1886-87) L. L. R. 10 Mad. 375 (506).

A claim for mesne profits is virtually a claim for damages: *Griak v. Shoski* (1); *Sambhu Nath v. Satish Chandra* (2) and *Sundermull v. Ladhuram* (3).

That the plaintiff was entitled to mesne profits from 1st September to 9th November, 1938 for wrongful possession of defendant No. 1 and for damages after 9th November, 1938 for the loss occasioned by the costs, charges and expenses of the Receiver:

*Surendralal Chandhuri v. Sultan Ahmad* (4).

That a prayer for damages for the period which followed the Receiver's appointment could be joined with that for mesne profits for the period which preceded the appointment, though the former did not arise until after the suit had been filed:

*Nuri Mian v. Ambica Singh* (5) and other cases.

*Messrs. B. C. Ghose and S. B. Sinha* for the Plaintiff.

*Mr. A. C. Mitra* for Defendant No. 1.

The following judgment was delivered by

**Khundkar, J.**—This is a suit for the recovery of possession of premises 56/1, Canning Street, and for mesne profits and damages.

These premises are said to appertain to an estate of which the plaintiff and the second defendant are trustees. It should be stated here that in the present action the second defendant is siding with the plaintiff. By an Indenture of lease dated May 6, 1932, these premises were demised by the plaintiff and the second defendant to the first defendant with retrospective effect from September 1, 1931, at a monthly rental of Rs. 1500 inclusive of occupier's share of taxes. The lease expired on August 31, 1938. Prior to that date and also afterwards some correspondence passed between the attorneys of the first defendant and the attorneys of the plaintiff and the attorneys of the second defendant. The purport of the letters written by the attorneys of the first defendant was that their client, the first defendant, was not in a position to give vacant possession to the lessors on the expiry of the lease, but was ready to call upon certain sub-tenants who were in actual occupation of the premises to attorn to the lessor. Reference may particularly be made to the letter of the first defendant's attorneys to the attorneys

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(1) (1900) I. L. R. 27 Calc. 951 (967) P. C.

(2) (1920) 25 C. W. N. 369 (372).

(3) (1923) I. L. R. 50 Calc. 667.

(4) (1934) I. L. R. 62 Calc. 217 (220).

(5) (1916) I. L. R. 44 Calc. 47.

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of the second defendant dated September 2, 1938 which contains the following sentence :—

"It was known to the Trustees that the property having been let out to various tenants with their knowledge our client could not make over vacant possession of the same and he would have delivered possession to the Trustees by attorning tenants in their favour."

It would appear from the correspondence referred to that, although the plaintiff would seem at one time to have been not unwilling to accept such possession as the first defendant was in a position to give, the second defendant insisted upon delivery of vacant possession (vide letter of Messrs. N. C. Mandal & Co. dated 31st August, 1938 to Messrs. Kar Mehta & Co., and the letter of Messrs. Mullick & Palit dated 1st September, 1938 to Messrs. Kar Mehta & Co.).

On September 5, 1938 the position taken up by the plaintiff in regard to the question of delivery of possession was made abundantly clear by a letter of that date addressed on his behalf by Messrs. N. C. Mandal & Company to Messrs. Kar Mehta & Company.

"Messrs. Kar Mehta & Company,

Re: 56/X, Canning Street.

DEAR SIR,

We have seen our client with reference to your letter of the 1st instant. Your client in concert and conspiracy with Babu Lakhi Narain Khettry is trying to make unlawful gain by holding over possession of the premises as he is now actually realising Rs. 2,000 per month from there. If your client's intention is bona fide he can make over to Lakhi Narain Khettry letters of attornment addressed to the tenants directing them to pay their rents from the 1st September, 1938 to Lakhi Narain Khettry. Our client has no objection to this course provided you send us copies of these letters of attornment. There is no necessity of both the trustees going over at the premises and taking symbolical possession.

We have again to inform you that no one is authorised on behalf of our client to receive any payment from your client and if he makes any payment in spite of this he will do so at his own risk.

Yours faithfully,

Sd. N. C. MANDAL & Co."

On September 8, 1938 the attorneys of the second defendant wrote to the attorneys of the first defendant in the following terms :—

" Messrs. Kar Mehta & Co.

Re : 56/1, *Canning Street*.

DEAR SIRs,

With reference to your letter to us of the 2nd and the 7th instant, we should like to know the time within which your client can give vacant possession of the premises.

Our client does not agree with his co-trustee to take upon the burden of collecting rents from different tenants of the premises.

Yours faithfully,

Sd. MULICK & PALIT".

The matter rested there until November 7, 1938 when the present suit was filed and an interim Receiver appointed. Meanwhile, during the period between August 31, when the lease expired, and November 10, when the Receiver took possession, the first defendant had collected certain rents from the sub-tenants who were in occupation of the premises.

The order appointing the Receiver was made final on November 16, 1938.

In paragraphs 8, 9 and 10 of his written statement, the first defendant admits that after the expiry of the lease he realised various sums on account of rent from the sub-tenants amounting to Rs. 1852. He claims to be entitled to deduct a sum of Rs. 296-3-6 from this sum on account of charges for establishment, maintenance and electricity, and further to set off against the plaintiff's claim a sum of Rs. 385 which he was unable to realise from two sub-tenants on account of arrears of rent accrued due to the defendant prior to the expiry of the lease. He expressed readiness to pay over the balance of the amount collected by him.

With reference to the written statement of this defendant, a good deal, in my opinion, turns upon paragraph 12, which is thus expressed.

" This defendant states that the plaintiff's claim as against this defendant is false and vexatious to the knowledge of the plaintiff. This defendant claims payment to him by the plaintiff of costs by way of compensation. This defendant states that this suit has been instituted to harass this defendant and should be dismissed with costs."

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It is to be noted that, although the first defendant was not disputing the fact that his tenancy had come to an end on the 31st August, when his lease expired, he was insisting when he filed his written statement that the suit of the plaintiff, in which delivery of possession was clearly asked for, should be dismissed. Another fact of considerable significance is that this defendant has never denied that he went on realising rents from the sub-tenants right up to the time when the Receiver was appointed.

The facts stated above are admitted, and I think they are the only facts which need be considered for the purposes of this suit, which really turns upon questions of law.

The case for the plaintiff, briefly stated, is that [the first defendant was liable to deliver vacant possession of the premises when the lease expired; that his offer to give what is called symbolic possession by asking the sub-tenants to attorn to the lessors was not in law a sufficient discharge of this liability; that his profession of willingness to surrender possession is belied by his conduct in continuing to collect rents from the sub-tenants after the 31st August; that by collecting rents in this way, the first defendant committed overt acts of trespass, that the plaintiff was compelled to ask for the appointment of a Receiver in order to prevent the first defendant from prolonging his trespass and from continuing to intercept the rents payable by the sub-tenants; that the first defendant is liable to compensate the lessor for any loss of profit to them which arose out of the defendant's conduct between the 31st August and the 10th November, and also out of the circumstance that the Receiver has been in possession since the last-mentioned date.

The case for the first defendant is as follows :—The first defendant was not bound to deliver vacant possession to the lessors on expiry of the lease. In any event, owing to the willingness of the plaintiff to accept possession in the shape of an attornment by the tenants, all that the defendant was liable to do was to get the tenants to attorn to the lessors. This he had offered to do, and it was through no fault of his, but because the lessors had disagreed between themselves, that the attornment was not made. The lessors not having taken possession in the manner in which the plaintiff was willing to accept it and in which it was offered, the first defendant was within his rights in continuing to collect rents from the sub-tenants, and he had to do this in order to protect himself against any demand by the lessors from him for rent for the period which followed the expiry of the lease. In any event,

even if he was a trespasser after the lease expired, he ceased to be a trespasser when the Receiver was appointed. The possession of the Receiver having terminated the possession of the first defendant, he cannot be liable for anything after the Receiver came into possession. The Receiver having been appointed at the instance of the plaintiff, it is the latter who must bear the costs arising out of and following upon the Receiver's appointment. If the first defendant is held liable for these, such costs are not mesne profits, nor can they be awarded as damages. At best they are costs incidental to the litigation, and, assuming the first defendant to be liable for these, they must be ascertained, not by the Court, but by the Taxing Officer.

The plaintiff is asking for mesne profits and for damages against the first defendant for the period commencing on 1st September 1938, that is, upon expiry of the lease until possession is decreed and the Receiver discharged. It is suggested on his behalf that he should be allowed to recover for this period at the rate of Rs. 1500 p.m., and that credit should be given to the first defendant for the total of the nett realisations by the Receiver, that is, his total realisations less costs, charges and commission, during the period in which the latter has been in possession, that is to say, from the 10th November, 1938. As regards this period the plaintiff asks to be allowed to take whatever the Receiver may have collected less the latter's costs charges and commission. But he is anxious to secure a nett payment of Rs. 1500 p.m. As the Receiver's nett collections would be below that figure, he claims to be entitled to recover the difference from the first defendant. Regard being had to the actual rentals paid by the tenants in occupation to the Receiver, I am told that the said difference, would be approximately equal to the Receiver's costs, charges and commission. It is thus apparent that as regards the period during which the Receiver has been in possession what the plaintiff is seeking to recover from the first defendant actually is what it has cost to keep the Receiver in possession in addition to damages at the rate of Rs. 1500 per month.

As regards the interval between the 1st September, 1938, the date following that on which the lease expired, and the 10th November, 1938, when the Receiver took possession, the first defendant, as already stated above, admits his liability to pay what he collected from the tenants, which, according to him, amounted to Rs. 1852, less a sum of Rs. 296-3-6, being charges

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for establishment, electricity and maintenance, less a sum of Rs. 385, being rentals which he did not succeed in collecting from two of the tenants, and which had accrued due during the currency of the lease.

I shall return to these questions later. The issues framed in the case are as follows :—

1. Was the defendant No. 1 ready and willing to deliver over possession to the Trustees ?
2. Is the defendant No. 1 entitled to a set-off as claimed in the Written Statement ?
3. Up to what period is the plaintiff entitled to mesne profits ? To what damages is the plaintiff entitled ?

Mr. A. C. Mitra, who appeared for the first defendant, advanced the proposition that a lessee would be under no obligation to deliver vacant possession upon expiry of the lease, if the sub-tenants in actual occupation at that time were persons who had been inducted into their tenancies by the lessor prior to the commencement of the lease. Mr. Mitra stated that he desired to call evidence to show that, in the present case, some of the sub-tenants, who were in occupation on the 1st September, 1938, were there as early as the 1st September, 1931, on which date the lease had taken effect. The allegation that the lessee had taken from the lessors, not a vacant house, but one in which there were tenants, is contrary to the plain tenor of the lease, and the point was not pleaded. To have allowed evidence to be called to substantiate such a statement without proper notice to the plaintiff would have been manifestly unfair. I intimated to Mr. Mitra that I was prepared to adjourn the hearing in order to allow him to amend his client's written statement by pleading this circumstance, but Mr. Mitra was not willing to make the amendment. This being so, I had to refuse to allow the first defendant to call evidence to prove that the premises demised to him were not vacant premises. The plaintiff would have been embarrassed if called upon to meet such evidence without being informed in advance that a defence of this kind would be raised. In my opinion, a lessor in the plaintiff's position would be entitled to ask for a disclosure regarding the names, and perhaps certain other particulars, of the alleged tenants whom he is said to have brought into the premises prior to the commencement of the lease and in the present case the first defendant's refusal to amend his written statement deprives the plaintiff of notice and also of opportunity for asking for necessary particulars.

During argument, it was conceded by Mr. Mitra that this lease has to be construed as one which requires the tenant to surrender vacant possession on the termination thereof. His argument was that the plaintiff's willingness to accept letters of attornment from the sub-tenants in lieu of vacant possession materially altered the position regarding the first defendant's liability to deliver vacant possession. After the plaintiff had intimated that he was willing to accept delivery of possession in the form of an attornment by the sub-tenants, the first defendant could not, in law, be called upon to do anything more than procure such attornment. The obduracy of the second defendant in insisting upon vacant possession frustrated such a course. The first defendant had therefore to continue to remain in possession of the demised premises. It was the conduct of his lessors which put him into that position, which was therefore that of a tenant holding over, and not that of a trespasser.

The argument is ingenious, but the fallacy at the root of it consists of stating that the act of the plaintiff in expressing his readiness to accept attornment by the sub-tenants extinguished the liability of the first defendant to deliver vacant possession. Such a liability could no doubt be extinguished through the operation of estoppel or of acts amounting to waiver or acquiescence. Apart from the circumstance that neither estoppel nor waiver nor acquiescence have been pleaded, I fail to see how they could arise on the facts proved or admitted. Mr. Mitra did not in fact invoke estoppel. As regards waiver or acquiescence the necessary consensus is wanting. The lessors were trustees of an estate to which the demised premises appertain. It was the estate, acting through the trustees, that was the real lessor. If it is assumed, as it must be, that in relation to the lease with which we are concerned, the trustees' powers were joint, then no act performed by one trustee in respect to it, without the consent of the other, could bind the estate. An act which might amount to waiver or acquiescence by the plaintiff when performed in his individual capacity could not, when done by him as trustee, bind the trust estate unless it had the concurrence of his co-trustee. The right of the trustee lessors to recover vacant possession was not renounced by the willingness of only one of them to take delivery of possession in some other mode. The liability of the first defendant to deliver vacant possession remained, and it has never been discharged. It follows that, as from the 1st September 1938, the first defendant became a trespasser,

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In support of his contention that the first defendant was not liable for mesne profits after the expiry of the lease, Mr. Moitra relied on a passage in the judgment in *Raja Sashikanta v. Raja Sarat Chandru* (1). "It may be conceded that, as ruled in *Ibbs v. Richardson* (2), in no case can the plaintiff claim mesne profits for any period subsequent to an offer by the defendant to restore him possession". That this sentence standing by itself is an incomplete statement of the law is manifest from the words which immediately follow it: "But the subordinate Judge has found that there was no genuine offer to restore the plaintiff to possession and no actual withdrawal from occupation by the defendant". In the present case it is not possible to say that there was any genuine offer by the first defendant to restore the plaintiff to possession, because on the plain language of the lease the possession to which the lessors were to be restored was vacant possession.

Mr. Moitra next argued that the character of the first defendant's possession, after the expiry of the lease, has to be determined in the light of two circumstances. The first is that the plaintiff's readiness, coincident with the second defendant's unwillingness, to take an attornment from the sub-tenants misled the first defendant into thinking that he was entitled to hold over and the second is that he had to continue collecting rents from the sub-tenants to protect himself against future claims by the lessors which he might have been held liable to satisfy. To use, what I think were Mr. Mitra's own words, the first defendant's possession after the 31st August, 1938, was not trespass "because it was not contumacious". No authority has been cited in support of this proposition, which, in my opinion, will not bear scrutiny. What amounts to a civil trespass is well-known, and ordinarily ignorance in regard to one's legal liability, or the fact that one acted from motives of prudence and foresight cannot afford a defence, I do not think it can be seriously contended that such an invasion of a landlord's rights as took place here is a wrong to which the doctrine "*actus non facit reum, nisi mens sit rea*" can ever apply.

Had no overt act of trespass been committed by the first defendant in the interval between the 31st August and the 10th November, when the Receiver took possession, the trustees-lessors, would have been free to make their own arrangements, if

(1) (1921) 34 C. L. J. 415 (428).

(2) (1831) 9 A & E 849 (853).

so advised, with the tenants who were in actual occupation of the premises. But the first defendant intervened, treating the tenants as his tenants and himself collecting the rents payable by them. It would clearly be not right in these circumstances to say that the plaintiff is entitled to recover something not amounting to meane profits for this period. A fair rate would be Rs. 1,500 per month which is the figure of the monthly rental originally payable under the lease. I am told the Receiver has made some collections in respect of the period prior to the 10th November, and the first defendant must therefore be given credit for the amount so collected, whatever it may be. In this view of the matter the proposals embodied in paragraphs eight to ten of the first defendant's written statement cannot be entertained.

The next point taken by Mr. Mitra was that, whatever might be the second defendant's liability in respect of the period which intervened between the expiry of the lease and the appointment of the Receiver, that liability ceased upon possession being taken by the Receiver. The Receiver ousted the first defendant from possession and so terminated the latter's trespass, if trespass it was. The Receiver was appointed at the instance of the plaintiff, and thereafter held possession for the benefit of the plaintiff.

Put in this way, the argument cannot possibly prevail. It is well-settled that a Receiver does not hold for the benefit only of the party at whose instance he is appointed. The Receiver is an officer of the Court, and though he holds for the ultimate benefit of the parties to the suit, the property, when it comes into his possession, becomes "*in custodia legis*". The true position of a Receiver who enters upon possession under an order of the court, has been repeatedly expounded, and a reference to authority leaves the question in no manner of doubt.

In *Kartick Nath Pandey v. Padmanand Singh* (1). Tottenham and Ghose, JJ. said :—"The appointment of a receiver is not, we think, the same thing as the cancelment of a lease, or the ejectment of a leaseholder. As pointed out by the learned counsel on the other side, the possession of the receiver is not adverse to the leaseholder, and could not be pleaded against him in any question of limitation. The possession of the receiver is for the benefit of the parties to the suit."

In *Tohru Bibi v. Zabeda Khatoon* (2) the object for which a Receiver is appointed is stated in the following words :—".....

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(1) (1885) 11 L. R. 11 Cal. 496 (498).

(2) (1910) 7 I. C. 75.

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that object is to protect the state from unnecessary and expensive litigation to preserve it for the equal benefit of those equally interested in its distribution and to keep the property at all times within the control of the Court by which the Receiver had been appointed."

In *Harihar Mukerji v. Harendra Nath Mukerji* (1) Mookerjee and Carnduff, JJ. made the following observations:—"It is well settled that a Receiver by his appointment does not become the representative of the parties, but is an officer and representative of the court which appoints him. The effect of the appointment of a Receiver is to bring the subject-matter of the litigation *in custodia legis*, and the Court can effectively manage the property only through its officer, who is the Receiver. In other words, the Receiver ordinarily is not the representative or agent of either party in the administration of the trust, but his appointment is for the benefit of all parties, and he holds the property for the benefit of those ultimately found to be the rightful owners....."

The actual position of a Receiver in possession of property which is the subject of litigation was again explained by Mookerjee J. in the case of *Dwijendra Narayan Roy v. Jagesh Chandra Das* (2), in the following words:—"When the Court has appointed a Receiver and the Receiver is in possession, his possession is the possession of the Court, and the possession of the Court by its Receiver is the possession of all parties to the action according to their titles: *Re Butler* (3); *Bertrand v. Davies* (4); *Moir v. Blacker* (5) and *Re Ind. Coops & Co.* (6). The property passes into legal custody as the Receiver is in the position of stake-holder, and such custody is for the benefit of the true owner.....*Brajendra Kishore v. Abdul Rasac* (7); *Ramaswamy v. Muthusamy* (8); *Khagendra v. Matangini* (9); *Rao Karan v. Rajah Baker Ali* (10) and *Jagat Tarini v. Naba Gopal* (11)".

(1) (1910) I. L. R. 37 Calo. 754 (757); 12 C. L. J. 252 (254)

(2) (1924) 39 C. L. J. 40 (57).

(3) (1863) 13 Ir. Ch. R. 456.

(4) (1862) 31 Beav. 429.

(5) (1890) 26 L. R. Ir. 375.

(6) [1911] 2 Ch. 223.

(7) (1915) 22 C. L. J. 283.

(8) (1906) I. L. R. 30 Mad. 12.

(9) (1890) L. R. 17 I. A. 62; I. L. R. 17 Calo. 814.

(10) (1882) L. R. 9 I. A. 99; I. L. R. All 1.

(11) (1907) I. L. R. 34 Calo. 305; 5 C. L. J. 270.

It is clear from the foregoing enunciations of the law that the ousting of the first defendant from possession, even if it operated to terminate his trespass, did not have the effect of passing possession to the plaintiff inasmuch as the Receiver could in no sense be regarded as the plaintiff's agent.

Mr. Mitra then contended that any loss of which the plaintiff might complain, as incidental to and arising out of the period during which the Receiver was in possession, could not be claimed as mesne profits, because such loss would not answer the definition of mesne profits in section 2(12) of the Code of Civil Procedure. That definition is in the following terms:—"Mesne profits of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession."

Mr. Mitra argued that no question of the first defendant being in wrongful possession after the 10th November, 1938, could arise, because he was not in possession at all after that date when the receiver took possession. This point is unanswerable, and Mr. B. C. Ghose who appeared for the plaintiff, conceded that the compensation to which the plaintiff might be found entitled in respect of loss accruing to him from and after the 10th November, 1938, could not be strictly designated as "mesne profits". I accordingly permitted him to make a slight amendment of the plaint by inserting the words "and/or damages" after the word "profits" in clause (b) of the prayer portion. This amendment is, in my opinion, fair, and cannot in any sense embarrass the defence, because it was known from the very inception of this litigation that the plaintiff was demanding compensation for the entire period from the 31st August, 1938, when the lease expired, until possession to him would be delivered.

But Mr. Mitra objected to a claim for damages being introduced into the plaintiff's prayers on the ground that damages constituted a separate relief distinct from mesne profits, and there was no express provision in the Code which permitted damages to be joined with claims for delivery of possession, arrears of rent and mesne profits. He referred to Order 20 rule 12, and contended that the language of that provision indicates that when a suit is instituted for recovery of possession and arrears of rent no further relief other than mesne profits may be asked for. Order 20 rule 12 is as follows:—

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(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree—

- (a) for the possession of the property ;
- (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits ;
- (c) directing an inquiry as to rent or mesne profits from the institution of the suit until—
  - (i) the delivery of possession to the decree-holder,
  - (ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder, through the court, or
  - (iii) the expiration of three years from the date of the decree, whichever event first occurs.

(2) Where an inquiry is directed under clause (b) or clause (c) a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry.

It is clear from the language of sub-rule (1) that this provision applies only where, and in so far as, a suit for recovery of possession and for rent or mesne profits has been actually filed. The provision relates to the kind of decree which may be passed in such a suit. I fail to see how it can involve any prohibition regarding additional reliefs which a plaintiff who seeks to recover possession of immovable property may wish to ask for. To accept the view suggested by Mr. Mitra would be to deny the inherent power of the Court to grant such reliefs as the nature of the case might legitimately demand, and the contention is opposed to the provisions of Order 2 rule 4 of the Code itself which is in these terms :—

"No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property, except:—

- (a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof ;
- (b) claims for damages for breach of any contract under which the property or any part thereof is held ; and
- (c) claims in which the relief sought is based on the same cause of action :

Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property".

This provision has to be read with Order 2 rule 3 (see in this connection *Giyana v. Kandasami* (1).

Order 2 rules 3 is as follows :—

(1) "Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly ; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit."

In my judgment, the compensation for loss which the plaintiff claims, in respect of the period covered by the Receiver's possession may be caught up under clause (b) of Order 2, rule 4 because it arose, in the final analysis, out of the breach of the contract to surrender vacant possession. In any event, it is within the intention of clause (c) of Rule 4 of Order 2, "claims in which the relief sought are based on the same cause of action". The relief here sought is compensation for loss occasioned by possession being held by a Receiver who had to be appointed because of the first defendant's failure to surrender possession. The failure of this defendant to deliver possession to the lessors is the principal cause of action in the present suit. The claim for the relief is based on this cause of action.

As regards the language of Order 20 rule 12 (1) (b) it may be observed that it has been held that a claim for mesne profits is virtually a claim for damages : *Grish Chandra v. Shoshi* (2) and *Sambhu Nath v. Satish Chandra* (3). It might further be noted that the Code itself in section 144 (1) contemplates the refund of damages, compensation and mesne profits when restitution is made to the party entitled to it upon the variation or reversal of a decree. Reference may also be made to *Sundermull v. Laduram* (4), where a landlord was allowed to recover both mesne profits and damages.

(1) (1887) 1 L. R. 10 Mad. 375 (506).

(2) (1900) 1 L. R. 27 Calo. 951 (967).

(3) (1920) 25 C. W. N. 369 (372).

(4) (1923) 1 L. R. 50 Calo. 667.

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In the present case, the plaintiff incurred loss by reason of the first defendant's failure to restore him to possession. Between the 1st September and 10th November, 1938, the loss was occasioned by the first defendant, who was in wrongful possession, taking the profits of the property. After the 10th November, it was occasioned by the costs, charges and expenses of a Receiver who had to be put in possession. But in neither case would loss have arisen at all had the first defendant restored the lessors to possession. Its cause being the same, the essential character of the plaintiff's loss was not changed, though its technical legal definition suffered alteration after the appointment of the Receiver. A loss which started as mesne profits continued as damages, but both flowed from the wrongful act of the first defendant in not surrendering possession. In *Surendralal Chaudhuri v. Sultan Ahmad* (1), it has been held by this Court that a person who obtains possession of immovable property under a decree which, at the time, was a valid decree, is not a trespasser, and is not liable for mesne profits for so long as the decree is not set aside. Upon the reversal in appeal, such person would, in respect of the period prior to the reversal, be liable to the real owner for compensation or damages and not for mesne profits in the strict sense of the expression, and for the period following the reversal he would, as a trespasser, be liable for mesne profits for such time as he continued to remain in possession.

Mr. Mitra next took the objection that a prayer for damages for the period which followed the Receiver's appointment could not be joined with a prayer for mesne profits for the period which preceded the appointment, because the latter represents a loss which accrued before the filing of the suit, whereas the former did not arise until after the suit had been filed. Here again there would seem to be a good deal of authority against the argument.

It has been held that where the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate, or that it is necessary to have the decision of the Court on the altered circumstances so as to shorten litigation or to do complete justice between the parties, the Courts may mould the relief on the basis of the altered circumstances. *Nuri Mian v. Ambica Singh* (2).

(1) (1934) I. L. R. 62 Cal. 217 (220).

(2) (1916) I. L. R. 44 Cal. 47.

In *Subba Naicken v. Rami Naicken* (1) the defendant during the pendency of a suit for a declaration of title, had taken possession of the property in dispute, and it was held that the plaintiff might amend the plaint by adding a prayer for possession instead of bringing another suit. (See also *Sivaswami Iyer v. Thirumudi Chettiar* (2).

In suits in which money was claimed, and the real cause of action arose only after the institution of the suits, it has been held that Court should not reject the plaint and drive the plaintiff to file a fresh suit, but should pass a decree on the basis of such subsequent cause of action. *Subbaraya Chetty v. Machiar Ammal* (3). This decision was followed in *Butchiraju v. Doddi Sestha ramayya* (4).

In *Priyambada Debi v. Bholanath Basu* (5), it was held, following *Ramyaad Sahu v. Bindeswari Kumar Upadhyay* (6), that it is not only within the power, but that sometimes it is the duty of the Court to take notice of subsequent events where, if it is not so done, the Court might decide matters no longer in controversy or deliver judgment which could not be carried into effect or grant a relief which is inappropriate and ineffectual. See also *Harmant Ramchandra v. Secretary of State for India* (7).

Mr. Mitra finally returned to his first contention, which was that the defendant No. 1 was not liable to compensate the plaintiff for any loss which may have arisen after 10th November, when he went out of possession. He however put the point in a different manner. His argument was that the first defendant did not resist delivery of possession, for which the plaintiff might have obtained a decree at any time had he chosen to bring the suit to hearing, and that in these circumstances it cannot be held that any loss accruing to the plaintiff in consequence of the Receiver's appointment, or of his continuing to remain in possession all this time, arose out of the first defendant's act or default.

The extent to which a tenant, who becomes a trespasser, is liable to his landlord for compensation has been frequently considered, but before I deal with this question, I would advert to a

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(1) (1912) 16 I. C. 734.

(2) A. I. R. [1930] Mad. 405 (410).

(3) A. I. R. [1918] Mad. 143.

(4) A. I. R. [1926] Mad. 377.

(5) (1932) I. L. R. 60 Cal. 685 (687).

(6) (1907) 6 C. L. J. 102.

(7) (1929) I. L. R. 54 Bom. 125 (142).

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matter to which I drew attention earlier in this judgment. - In paragraph 12 of the first defendant's written statement, he describes the plaintiff's claim as false and vexatious, and asks for the dismissal of the suit. When it is realised that the main relief which the plaintiff was seeking was recovery of possession, I do not see how it can be said that this defendant did not resist delivery of possession. There was nothing to prevent him. If so minded from confessing judgment in his written statement, at least in so far as the plaintiff's claim to be put in possession was concerned. It was his trespass that compelled the plaintiff to ask for the appointment of a Receiver, and although this defendant could at any time thereafter have applied to the Court to discharge the Receiver, and direct possession to be taken by the plaintiff, he did not do so. He has never, until the argument stage of this suit, as far as there is anything to show it, retired from the position that the plaintiff's suit should be dismissed in its entirety. It is therefore reasonably clear that both the appointment of the Receiver, and his continuance in possession until the hearing of the present suit, are attributable to the conduct of this defendant. Were the suit to be dismissed, as was prayed in the written statement of the defendant No. 1, the Court would have no option but to restore the *status quo*, and direct the Receiver to make over possession to this defendant from whom the Receiver had taken it. The Court would also be bound to order the Receiver to account to him for all collections and realisations made by the Receiver in respect of the property. It was for such a result that the first defendant must be deemed by reason of his written statement, to have been holding out.

"On the determination of the lease, the lessee is bound to put the lessor into possession of the property". This is section 108 clause (g) of the Transfer of Property Act. In *Sundermull v. Ladhuram* (1), where there was failure by a tenant to fulfil this obligation, a claim for mesne profits and special damages for trespass was allowed. Such damages were regarded, in *Gulam Mohi-uddin v. Darabhai* (2), as including the premium received from a sub-tenant, and in *Baharamgiri v. Vasudev* (3), as the cost of evicting a sub-tenant. In *Henderson v. Squire* (4), Cockburn, C. J. said:—"The landlord is entitled to recover all the loss he has sustained by not being put in possession of the entire premises at

(1) (1923) I. L. R. 50 Calc. 667.

(2) (1923) 25 Bom. L. R. 447.

(3) (1896) I. L. R. 22 Bom. 345.

(4) (1869) L. R. 4 Q. B. 170.

the end of the term". Mellor, J. said :—" There has been a breach of contract, and the damages sought to be recovered are those which necessarily flow from the breach".

Dealing in another case, with the liability of a tenant who fails to deliver possession after the expiration of a notice to quit, Cockburn, C. J. said that it was "not at all unreasonable but, on the contrary very salutary to hold him liable to compensate his landlord to the extent of the natural and necessary consequences of his wrongful act. *Bramley v. Chesterton* (1).

The answers to the issues in the present case are, as to 1 and 2, in the negative, and as to 3 as indicated below.

In my judgment the plaintiff is entitled to recover from the first defendant mesne profits up to the 9th November, 1938, and damages thereafter, the measure of both of which is the rent which the latter was paying under the lease. It is however desirable that in awarding compensation the distinction should be maintained between what constitutes damages properly speaking, and what appertains to costs of litigation. The costs, charges and expenses of the Receiver are really within the latter category, and the plaintiff should be given a decree which, while it covers all reasonable compensation, keeps straight the line of division between damages and costs. I accordingly hold that the plaintiff is entitled to a decree for recovery of possession, and for a sum calculated on the basis of Rs. 1500/- per month from the 1st September, 1938, till the 9th November, 1938, being mesne profits, and from the 10th November, 1938, till the making over of possession by the Receiver to him, for a sum calculated on the same basis as damages. The plaintiff is further entitled to costs.

The Receiver must make over possession forthwith. The first defendant is entitled to credit for all sums deposited by him in Court, and for the gross collections of the Receiver during the entire period of the Receiver's possession. He will also be entitled to credit for such sums, payable by the sub-tenants as rent, which the Receiver may have failed to realise during the period of his possession through want of due diligence. The first defendant will pay all costs, charges and expenses of the Receiver which were properly incurred as a result of this litigation. I am informed by Mr. Mitra that the services of the Receiver were

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utilised at various times for the concerns of the trust estate other than this suit. All charges referable to work done or costs incurred by the Receiver relative to any matter or proceeding which did not appertain to the dispute between the lessors and the first defendant in the present suit will be excluded from the amount of costs for which this defendant is liable. The apportionment just indicated will be made after scrutiny of the Receiver's accounts from this, as well as from the other usual and proper points of view.

The decree for possession, for mesne profits and damages will be in favour of the plaintiff and the second defendant jointly.

The second defendant will be entitled to his own costs of the suit out of the estate as between attorney and client. The plaintiff will in the first instance be entitled to retain and pay out of the estate his own costs (as between attorney and client) of the suit, other than costs charges and expenses of the Receiver.

There will be a reference to the Registrar, or such Officer as he may appoint, to enquire and report as to the gross collections of the Receiver from the date of his appointment, and as to his costs, charges and commission which are properly referable to this suit, and as to rents which he may have failed to realise.

The plaintiff and the second defendant will be entitled to jointly take all moneys now in deposit in the Court or lying in the hands of the Receiver.

The first defendant will be entitled before the reference to inspect the books and vouchers of the Receiver.

*Messrs. N. C. Mondal & Co.* : Solicitors for the Plaintiff.

*Messrs. Kar Mehta & Co., Bural and Pyne and S. C. Roy Chaudhury* : Solicitors for the Defendant No. 1.

*Messrs. Mullick and Palit* : Solicitors for the Defendant No. 2.

A. T. M.

Suit decreed.

## APPELLATE CIVIL.

*Before Mr. Justice N. A. Khundkar and Mr. Justice  
C. C. Biswas.*

SARAT CHANDRA MITRA

v.

SARADINDU MUKHERJEE.\*

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1945.

April, 20, 23, 24, 25.

*Bengal Tenancy Act (VIII of 1885), sections clause 1(b)—Tenant, holder of a tenure by virtue of a mourashi moharari lease—Landlord stipulating to maintain embankment on boundary of demised land—Embankment later on washed away by river and new embankment erected on part of demised land—Diminution in area caused thereby—Tenant, whether entitled to abatement of rent, land not being in a permanent settled area—Right to claim abatement of rent, when can be taken away—Section 179 if in the nature of exception—Onus of proving element bringing case within section 179—Recital in lease that parent estate nishar.*

The plaintiff respondent was holder of a tenure under the defendant appellant by virtue of a mourashi moharari lease. It was agreed between the landlord and tenant that the tenant would not be entitled to claim a reduction of rent for any reason whatsoever. The landlord also stipulated that he would maintain an embankment on the boundary on one side of the demised land beyond which was a river. The embankment was later washed away and the landlord erected a new embankment which of necessity had to be constructed upon a strip of demised land causing a diminution in the area. The landlord failed to prove that the land was in a permanently settled area. The plaintiff instituted a suit for abatement of rent owing to deficiency in the area of his tenure :

*Held*, that the plaintiff was entitled to claim reduction of rent under section 5a clause (1) (b) of the Bengal Tenancy Act in respect of diminution in the area.

The right given to a tenure-holder to apply for an abatement of rent on account of deficiency in the area of his tenure cannot be taken away by any contract except one which answers the description given in section 179 of the Bengal Tenancy Act. Section 179 of the Bengal Tenancy Act embodies a provision in the nature of an exception. The onus to establish every element necessary to constitute the exception is on the landlord.

A recital in the moharari lease that the estate had been redeemed from rent or revenue is not sufficient to show that it had been permanently settled.

\* Appeal from Appellate Decree No. 431 of 1941, against the decree of Ashutosh Ukil Banerjee, Esq., Subordinate Judge, 3rd Court, Alipur, dated the 27th September, 1940 affirming the decree of Babu Anath Bandhu Shyam, Munsiff, 1st Court, Barulpur, dated the 29th April, 1940.



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jee.

Appeal by the Defendant Landlord.

Suit by tenant for abatement of rent owing to deficiency in the area of the tenure.

The material facts will appear from the judgment.

*Messrs. Amarendra Nath Bose and Hemant Kumar Bose* for the Appellant.

*Messrs. Rajendra Bhuvan Bakshi, Amal Kumar Mukherjee and Sushil Kumar Biswas* for the Respondent.

The judgments of the Court were as follows :—

April, 25.

**Khundkar, J.** :—The plaintiff in the suit out of which this appeal has arisen was the holder of a tenure in the Sunderbans area which he held under the defendant by virtue of a mourashi mokarari lease. The plaintiff instituted a suit for abatement of rent owing to deficiency in the area of his tenure under section 52(1) (b) of the Bengal Tenancy Act. It was not disputed that the original settlement, as evidenced by the Kabuliat, was of an area of "900 bighas by guess", but that upon subsequent measurement it was found that the actual area of the tenure was 763 bighas. The case made by the plaintiff in the trial Court was that he was liable to pay rent in respect of 733 bighas only, as against the contention of the landlord defendant that rent was payable for an area of 763 bighas. A commissioner appointed to measure the land reported that the entire area of the tenure, extending up to the edge of a river which flowed alongside the eastern boundary, and inclusive of an embankment along the river side was 763 bighas, and that the area excluding the embankment and some land lying beyond it and between the embankment and the river, would be 733 bighas.

Whatever may have been the case made on behalf of the plaintiff in the Courts below, it is now contended on his behalf that though he is liable to pay rent for all the lands lying to the west of the embankment, he is not liable to pay rent for the land upon which the embankment stands or for the stretch of the land between the embankment and the water's edge on the east. The lower appellate Court has accepted the plaintiff's contention, and has held that the plaintiff is entitled to a reduction of rent in respect of 30 bighas of land being the difference between 763 and 733 bighas. It is against this decision that the landlord has appealed.

The facts which are admitted may be shortly stated. From

the Patta and the Kabuliat executed at the time of the settlement with the plaintiff's predecessor it appears that an embankment existed at that time which was referred to as the eastern boundary, and it is clear that that embankment was outside the lands of the tenure. The landlord undertook to maintain the embankment for the protection of the tenure against the inroads of the river. It was agreed between the landlord and the tenant that the tenant would not be entitled in future to claim a reduction of the rent then settled for any reason whatsoever. The embankment was later washed away, and the tenant having called the attention of the landlord to this fact, the latter proceeded to erect a new embankment for the purpose of protecting the tenant's lands as stipulated in the contract of tenancy. Apparently, the river had advanced so far to the west that the new embankment had, of necessity, to be constructed upon a strip of the demised land. As found by the Courts below, upon the report of the commissioner who was appointed to measure the disputed land, it is apparent that 30 bighas of the area originally demised have been taken up by the new embankment.

On behalf of the landlord appellant three points have been taken. It is argued, firstly, that the erection of the embankment has not caused any deficiency in the area of the tenure within the meaning of section 52(1) (b) of the Bengal Tenancy Act. It is pointed out in this connection that the case made in the plaint was one of loss of land by actual diluvion. The evidence and the findings arrived at by the Courts below, however, make it clear that no portion of the tenure originally demised was swallowed up by the waters of the river. Mr. Bose on behalf of the appellant has contended that, although it is well settled that loss of land by diluvion or other similar cause would be within section 52(1) (b), it cannot be said that any deficiency in the area of the tenure has taken place here, because that area is still intact as dry land in the possession of the tenure-holder, and the fact that an embankment has made its appearance along a strip of that area does not create any deficiency in area within the meaning of the words in section 52(1) (b) of the Bengal Tenancy Act. Mr. Bose relies upon a judgment of Biswas and Akram, JJ. in Special Appeal No. 424 of 1941 decided on the 29th of March, 1945. In that case, which has not yet been reported (1), my learned brother (Biswas, J.) considered the decision of Jack, J. in the case of *Achala Dasi v. Bijoy Chand Mahatab* (2), in which that learned Judge has held that if a

(1) since reported (1945) 49 C. W. N. 417.

(2) (1934) 38 C. W. N. 974.

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part of the land of a tenancy becomes covered up by sand so as to become wholly useless, the tenant is entitled to a proportionate reduction of rent under section 52(1) (b) of the Bengal Tenancy Act. A passage from the judgment in the later case is instructive and should be quoted :

" In our opinion, the language used in section 52 does not justify the interpretation which Jack, J. was inclined to put upon it. We do not think that deficiency in area can be construed to mean and include deficiency in the area fit for cultivation or for the purposes of the tenancy. That would, in our judgment, be an unwarrantable extension of the ordinary meaning of the word 'deficiency'. Clause (a) of section 52, which for this purpose may be regarded as a counterpart of clause (b), no doubt speaks of loss of the land of a tenure or holding by diluvion 'or otherwise'. The words 'or otherwise' must refer to a cause similar to diluvion, and those words should be interpreted as referring to something similar to diluvion and cannot, in our opinion, be regarded as wide enough to let in grounds of natural justice and equity. It is not necessary for our present purposes to consider whether an earthquake which might cause a complete subsidence of the land may or may not be regarded as a natural event of the same kind as diluvion. But we are not at all satisfied that a mere deposit of sand, although it may be described as permanent, can be placed on the same footing. In our view, therefore, the defendant in the present case could not claim abatement under the provision of section 52 of the Bengal Tenancy Act. "

For our present purposes it is of importance to note that Biswas and Akram, JJ. recognised that loss occasioned by causes similar to diluvion would bring a case within the meaning of the words " deficiency in the area of the tenure " in clause (b), and also that they had in mind such a contingency as a subsidence of land from earthquake, although they were not called upon to decide whether this particular eventuality would be within the intention of Clause (b).

It seems to us that the principle which underlies the rule that a tenant is entitled to abatement of rent in respect of any area which becomes submerged under the waters of a river is the principle that no tenant should be compelled to pay rent for land which has been torn from his tenure as a result of the action of a river. What we have to consider here is whether the taking from the tenure of the land required for the erection of the embankment was the inevitable consequence of encroachment by the river. In

the present case no portion of the area of the tenure became actually submerged by the advancing water, but the change in the course of the river, such as it was, compelled the landlord to take land from the area of the tenure for a new embankment. In the circumstances of the present case, the landlord had no option in the matter, because, as already indicated, he was bound by the contract to continue to protect the tenure by an embankment. It was at one stage suggested by Mr. Bose on behalf of the appellant that the proper remedy of the tenant in the present case would have been to proceed against the landlord for trespass. In the circumstances just referred to, it is clear that such a proposition will not bear examination. The action of the landlord in building the embankment was not only not wrongful, but it was an action to which he was impelled by the contract of tenancy when the river began to change its course. Looking at the purely physical phenomenon brought about by the building of the new embankment, it is clear that a mutilation of a portion of the tenure thereby took place, which, in our judgment, was as much a physical taking away from the tenure of a portion of its lands as would have been the submergence of those lands, had the river flowed over them. In either case there would be what may be called a truncation of the lands of the tenure occasioned by the action of the river. It might be said that in the one case the advance of the river would be the immediate cause of such a truncation, and in the other it would be only the mediate cause. In the special circumstances in which this embankment had to be built, we do not see that it makes any difference. In our judgment, the area of 30 bighas taken from the tenure by the embankment amounts to a deficiency in the area of the tenant's tenure such as entitled him to claim reduction of rent under section 52(1) (b) of the Bengal Tenancy Act.

Mr. Bose's second argument was that the tenant had contracted himself out of his rights under that section inasmuch as the argument of tenancy made it clear that he would not be entitled in the future to claim reduction of rent for any cause whatsoever. This argument has an appearance of cogency, because it may well be said that in the Sunderbans area, where rivers are constantly changing their courses, such an eventuality as has occurred in the present case would have been within the contemplation of the parties, where by the Kabuliati and the Patta the tenant waived his rights to claim reduction of rent in the future on any ground whatsoever. The question cannot, however, rest there. It has to be seen whether the law leaves a tenant free to waive his rights

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under section 52 of the Bengal Tenancy Act. Mr. Bose's contention is that freedom of contract is the general rule and that the special rights reserved to the tenant under section 52(1) (b) may at any time be abrogated by a contract. He draws our attention to clause (e) of sub-section 3 of section 178 the language of which is as follows:—

"Nothing in any contract made between a landlord and a tenant after the passing of this Act shall (e) take away the right of a raiyat to apply for a reduction of rent under section 38 or section 52."

It is pointed out that this provision stands in the way of the abrogation by a raiyat of the rights given to him by section 52, but it applies only to contracts made after the passing of the Act. The argument is that as regards contracts made before the Act came into force, raiyats were free to barter away the rights given to them by section 52. This provision shows therefore by necessary implication that, with the exception of contracts made by raiyats after the passing of the Act, all other contracts made by raiyats would prevail, notwithstanding the rights given to raiyats by section 52 (1) (b) of the Bengal Tenancy Act.

The answer to this argument is furnished by the fact that section 178(3)(e) of the Bengal Tenancy Act is not a provision which applies to all tenants, but only to raiyats. Tenure-holders are not included within the scope of this provision, nor are they affected by its implication. In order to ascertain whether tenure-holders are free to contract themselves out of the rights given to them by section 52(1)(b), it is section 179 of the Bengal Tenancy Act which has to be looked at. The material words of that section are as follows:

"Nothing in this Act shall be deemed to prevent a proprietor or a holder of a permanent tenure in a permanently settled area from granting a permanent mukarrari lease on any terms agreed on between him and his tenant."

The question which leaps to the eye is—Why it was necessary to enact this provision at all, if all tenure-holders were free to waive by contract the rights given to them by various section of the Bengal Tenancy Act? The section enacts that the terms of a mukarrari lease of a permanent tenure *in a permanently settled area* shall prevail notwithstanding anything contained in the Act, that is to say, notwithstanding anything contained in section 52. This is clearly said, and what is, therefore, necessarily and clearly implied is that the provisions of the Act relating to the rights of

tenure-holders, amongst which provisions must be included section 52, cannot except as provided, be neutralised by contracts entered into between the holders of permanent tenures and the proprietors of the superior estates. This question was adverted to by this Court in *Khetramoni Dasi v. Jiban Krishna Kundu* (1), which case later went up on appeal to the Privy Council. (2) The aspect of the matter now under consideration was not argued before the Judicial Committee, but it was referred to by this Court. It was dealt with by Woodroffe J in the following words which appear at page 41 of the report :

"The question then is, first, as to the meaning of section 52 of the Bengal Tenancy Act. The plaintiff is a tenant, and section 52, sub-section 1 (b) therefore is applicable to this case. The short question really before us is whether or not the plaintiff was competent to contract himself out of the rights which were given to him by that section, and if so, whether in fact he has so done. It is in the first instance to be observed that section 52 is not made subject to any proviso. It is not, as in the case of section 53, for instance, made subject to agreement or usage or the like. Prima facie, therefore, without reference to any further section it would be, having regard to the general scheme of the Act, a statutory right in the tenant which could not be affected by an agreement entered into by him. Then it is said that section 178 which declares that 'nothing in any contract between a landlord and tenant' shall affect the rights therein stated, does not expressly refer to the case of a tenant who is not at the same time a raiyat, for section 178(f) '—Now section 178(3)(e)—' only says that nothing in any contract between a landlord and tenant shall take away the right of a raiyat to apply for a reduction of rent under section 38 or section 52. As the plaintiff is not a raiyat, it may be conceded for the purpose of this judgment that section 178 does not deal with the case which is before us..... Section 179 does not apply to this case, for, it cannot be said that the tenure is situate in a permanently settled area within the meaning of that section. That section, however, I think, does show by implication this : that though section 178 does not expressly refer to the case of a tenure-holder, yet section 52 is not subject to agreement except as regards a particular class of tenants in permanently settled areas as dealt with in section 179. As I have said, the plaintiff does not come within that class. I

(1) (1916) Unreported. Decided by Woodroffe & D. Chatterjee JJ.

on June 9, 1916.

(2) (1920) L. R. 48 I. A. 39; 33 C.L.J. 214.

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would, therefore, hold that the plaintiff is entitled under the provisions of section 52 of the Bengal Tenancy Act to a reduction of rent and that the right is a statutory right which is not subject to agreement."

In our judgment, it is reasonably clear from a reading of section 52(1)(b) together with section 179 of the Bengal Tenancy Act that, in so far as a tenure-holder is concerned, the right given to him to apply for an abatement of rent on account of deficiency in the area of his tenure cannot be taken away by any contract except one which answers the description contained in section 179. This brings us to a further branch of the argument made on behalf of the appellant which was founded upon the contract of tenancy. Mr. Bose has contended that the tenure in question falls within the exception embodied in section 179, because, firstly, it was granted by a permanent mokerari lease and, secondly, the lands lie in a permanently settled area. With regard to the first mentioned condition, it is not disputed that the lease was a permanent mokerari one. With regard to the other requirement of the section, a difficulty arises. In the case of *Khetromoni Dasi v. Jiban Krishna Kundu* (1), an argument similar to that now advanced was made before the Judicial Committee, but their Lordships held upon the facts found that the appellant had failed to establish that the land was in a permanently settled area. Now, as is clear from what has been stated before, section 179 embodies a provision in the nature of an exception. The onus to establish every element necessary to constitute the exception is, in the present case, undoubtedly upon the appellant who claims the benefit of it. From the judgments of the courts below it does not appear that any attempt was made on behalf of the present appellant to prove that the tenure of the plaintiff respondent existed in a permanently settled area. In the argument before us an attempt has been made to show that the area in question was a permanently settled area by citing a recital in the *Kabuliyat* which alleges that the parent estate had been made *nishkar*. This is clearly not sufficient to prove that the touzi out of which the tenure was carved was a permanently settled one.

The third point taken on behalf of the appellant was that the plaintiff was not entitled to claim any reduction under section 52(1)(b) of the Bengal Tenancy Act, inasmuch as he had by a subsequent act clearly surrendered such a right. Mr. Bose has

(1) (1920) L. R. 48 I. A. 39; 33 C. L. J. 214.

drawn our attention to some evidence in the case which serves to indicate that after the old embankment was washed away, the tenant requested the landlord to put up a new one in its place. The contention is that such a request is consistent only with an offer by the tenant to give up voluntarily a portion of his land for a new embankment. It is said that from the request made we must infer that the tenant was offering to surrender and sacrifice his land in order that he might obtain the embankment, and it is argued that as that offer formed part of the new bargain between him and the landlord, he cannot complain of any reduction of his tenure caused by the building of the new embankment, and may not, therefore, ask for reduction of rent on that ground. This argument is founded upon the assumption that the tenant's request to the landlord to build an embankment carried with it the implied offer to voluntarily surrender some land for that purpose, and upon the further assumption that the landlord would never have agreed to erect the new embankment had such an offer not been made. The terms of the Potta and the Kabuliyat would make it clear that these assumptions are erroneous. As already stated, the landlord was under a contractual obligation to protect the lands of the tenure by an embankment, and he was, therefore, only discharging a legal duty when he constructed a new embankment to replace the old one which had been washed away. In the light of the contract of tenancy the tenant's request to the landlord to put up the new embankment amounted to no more than a request not the landlord should do what he had already undertaken to. We cannot see how such a request can be construed as implying that the tenant was abandoning any of the rights vested in him by the Bengal Tenancy Act.

All the points taken by Mr. Bose on behalf of the appellant accordingly fail and this appeal must be dismissed with costs.

**Biswas, J. :—**The arguments in the case have covered a wide field, and my learned brother has dealt with them fully in the judgment he has just delivered. I agree that the appeal should be dismissed with costs, and the respondent held entitled to the reduction of rent which the courts below have granted him. I should like, however, to add a few words, as it appears to me that there was some confusion of thinking on the part of the learned Munsif and the learned Subordinate Judge as to the applicability of section 5a of the Bengal Tenancy Act to the facts of the case.

In the plaint the plaintiff did not specifically mention this section,

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but there can be no doubt that he made a case of abatement under sub-clause (1) (b) thereof. It was alleged that there had been diluvion which had caused a diminution in the area of the tenure, and a reduction of rent was claimed on that ground. At the trial the case also proceeded on the basis of section 52, and I have no doubt that upon the facts of the case, as my learned brother has pointed out, that section is attracted. It appears, however, from the judgments of the court below that although they purported to apply section 52, they were not still quite accurate in stating the grounds on which a reduction of rent would be justified in terms of this section. The learned Munsif said that the disputed strip of land covering about 30 bighas, which made the difference between the plaintiff's claim and that of the defendant, had become "useless for agricultural purposes" The learned Subordinate Judge also adopted the same language, adding the further fact that the tenant was out of possession of the aforesaid area. This seems to suggest that in the opinion of the learned Munsif as well as of the learned Subordinate Judge, it would be a fit ground for allowing reduction of rent under section 52 (1) (b) of the Bengal Tenancy Act, if it was established that some portion of the lands had become unfit for the purposes of the tenancy, or that the tenant had been out of possession of the same. With all respect, I do not think that section 52 contemplates any such ground. Whether or not, at general law or under the provision of any Statute, a tenant may claim abatement of rent on the ground of deterioration of any portion of the tenancy or on the ground that he had lost possession of any land or been otherwise deprived of its use, is a different question altogether, a question which, it may be stated, is not altogether free from difficulty. As will appear from certain very instructive observations of Rankin, C. J. in the Full Bench case of *Arun Chandra Sinha v. Shamsul Huq* (1), the English law and the Indian law in the subject are perhaps not quite the same, and it will further be seen that even so high an authority as Sir Barnes Peacock C. J. had misstated the English law on the point in some earlier case reported in the Weekly Reporters series (2) to which reference is made in the Full Bench judgment. On the facts of the present case, we are not called upon to decide this debatable point. It is sufficient to hold that the facts make this out to be a case proper under section 52 (1) (b). It is not disputed that owing to the

(1) (1931) I. L. R. 59 Calo. 155; 54 C. L. J. 31 (46)

(2) *Seetee Enayutollah v. Sheikh Elaherbukhsh*, (1854) Gap (Act X Rulings) 42 (43)—Ed.

erection of the new embankment on a site inside the original tenure, some lands which belonging to the tenure were effectively taken away from it. This was undoubtedly a physical diminution in the area of the tenure, and if this did not constitute a "deficiency" within the meaning of section 52 (1) (b) of the Bengal Tenancy Act, I do not know that what would. It cannot be disputed, in fact it has been so held in numerous decisions of this Court and has also been recognised in the Statute itself,—that diluvion comes within section 52. The section also covers grounds similar to diluvion. In this case, although it cannot be said that the disputed area had been actually washed away by the river and that the deficiency in the area had been directly caused thereby, it cannot be disputed that this was the ultimate result of diluvion. It was the advancing waters of the river which made it necessary to abandon the old embankment; the old embankment itself had in fact gone under water. By virtue of the agreement which was embodied in the lease the landlord was bound to put up a new embankment, but the only available site was inside the tenure. By putting up the embankment there, the landlord could not be said to have dispossessed the tenant in any way, but whether it did or did not amount to dispossession, there can be no doubt that it did cause a diminution in the area. That being so, section 52 would be clearly attracted. The case would accordingly come within the scope of the decision of the Judicial Committee in *Khetromoni Dasi v. Sibon Krishna Kundu* (1). In that case the Judicial Committee held on a construction of the terms of the grant to the landlord respondent that the tenancy did not come within the description of a permanent tenure in a permanently settled area under section 179 of the Bengal Tenancy Act. The grant is not forthcoming in the present case, but the onus lay upon the landlord defendant to prove the terms of the grant, if he desired to bring his case within the exception embodied in section 179. That onus, as my learned brother has pointed out, has not been discharged. The recital in the mokarari lease that the estate had been redeemed from rent or revenue is not sufficient to show that it had been permanently settled. In this view of the matter, as I have said, I agree with the judgment delivered by my learned brother.

A. K. D. G.

*Appeal dismissed.*

(1) (1920) L. R. 48 L. A. 39; 33 C. L. J. 214.

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## CIVIL REVISION.

*Before Mr. Justice B. K. Mukherjee and Mr. Justice W. McSharpe.*

NONI LAL CHOWDHURY

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LALIT MOHAN MUKHERJEE.\*

Civil.

1944.

February, 16.

*Small Causes Court, if has jurisdiction to try a suit under section 36, Bengal Money Lenders Act (X B. C. of 1940)—Decree passed by Small Causes Court—Decree transferred to Civil Court for execution—Which Court to try the suit under section 36 for reopening of the decree and other reliefs—Provincial Small Causes Court Act, (IX of 1887) Schedule II. Articles 4, 11, 21 and 23.*

A suit for recovery of money due on a promissory note was decreed by Small Causes Court at Sealdah. The decree was transferred to the Court of Munsiff at Alipore for execution. The judgment-debtor filed a suit under section 36 of the Bengal Money Lenders Act in the said Court of the Munsiff, for re-opening the decree. The only question raised was one as to the forum of the suit:

*Held:* A suit for obtaining relief under section 36 of the Bengal Money Lenders Act is not any such suit as is exempt from the cognisance of a Small Causes Court under Articles 4, 11, 21 and 23 of the Second Schedule to the Provincial Small Causes Court Act. Re-opening of a decree under section 36 is a new species of relief introduced by the Act. The entire procedure is regulated by the provisions of the Act itself and there is nothing in the Act which lends countenance to the view that Small Causes Court Judges are not competent to exercise powers given by the Act.

*Satya Narain Banerji v. Radha Nath Das* (1) followed.

There is nothing in the Provincial Small Causes Court Act to prevent a Small Causes Court Judge from making an order of restoration of property.

Suit under section 36 of the Bengal Money Lenders Act.

Application by Borrower under section 115 of the Code of Civil Procedure against an order returning the plaint for presentation to proper Court.

*Mr. Ranjit Mukherjee* for the Petitioner.

*Messrs. Sitaram Banerjee and Arun Kumar Dutt* for the Opposite Party.

The material facts will appear from the judgment.

\* Civil Rule No. 1392 of 1943, against the order of Additional Subordinate Judge, 24-Perganas, dated the 22nd May, 1943.

(1) (1941) 45 C. W. N. 1085.

The judgments of the Court were as follows :—

**Mukherjee, J.** :—The petitioner before us was a defendant in a suit for recovery of money due on a promissory note which was brought against him by the predecessor-in-interest of the opposite party in the Court of Small Causes at Sealdah. A contested decree was obtained in that suit by the opposite party and it was transferred for execution to the Court of the first Munsiff at Alipur, where certain immovable properties belonging to the judgment-debtor were attached and put up to sale and were purchased by the decree-holder. The petitioner has now brought a suit for reopening the Small Cause Court decree under section 36 of the Bengal Money Lenders Act and the suit has been filed in the Court of the Munsiff at Alipur and not in the Court of Small Causes at Sealdah where the decree on the loan was recovered. The Munsiff of Alipur has returned the plaint on the ground that he has no jurisdiction to entertain the suit and that the proper forum of such suit would be the Court which originally made the decree.

This order was affirmed on appeal by the Court of the first Additional Subordinate Judge, 24-Perganas and it is against this order that the present Rule has been obtained.

Now, it has been held by a Division Bench of this Court in the case of *Satya Narayan Banerji v. Radha Nath Das* (1), that when a decree has been already passed a suit to obtain relief under section 36 of the Bengal Money-Lenders Act can be brought only in the Court which passed the decree at the suit of the creditor for recovery of the loan, and in no other Court. The learned Advocate for the petitioner has contended before us that the principle enunciated in that decision is not applicable to a Small Causes Court decree. The contentions put forward are of a two-fold character. In the first place he has argued that such a suit is exempt from the cognisance of a Small Causes Court under articles 4, 11, 21 and 23 of the Second Schedule to the Provincial Small Causes Court Act. The other ground taken is that as a Small Causes Court Judge is not competent to order restoration of any immovable property that the decree-holder has taken possession of, in execution of the decree, under section 36(2) (c) of the Bengal Money-Lenders Act such a suit could not be filed in a Court of Small Causes.

So far as the first ground is concerned, we are definitely of opinion that a suit for obtaining relief under section 36 of the Bengal Money Lenders Act is not a suit for possession of immovable property or for determination or enforcement of any right to or

(1) (1941) 75 C.L.J. 229; 45C. W. N. 1085.

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interest in such property as contemplated by Articles 4 and 11 of the Second Schedule to the Provincial Small Causes Courts Act. It is not a suit also to set aside a sale within the meaning of Article 21. We are further of opinion that it is not a suit to which the provisions of Article 23 are attracted. Re-opening of a decree under section 36 of the Bengal Money Lenders Act is a new species of relief which has been introduced by the Money Lenders Act. It is not strictly speaking correct to say it is the same thing as setting aside a decree on grounds of fraud or irregularity or altering a decision on grounds of any defect or error in it. The entire procedure is regulated by the provisions of the Act itself and there is nothing in the Act which lends countenance to the view that Small Causes Court Judges are not competent to exercise powers given by the Act. If the contention of the learned Advocate for the petitioner is accepted the result in the present case would be, that in case the old decree is re-opened and a new one made under section 36 Money Lenders Act, the new decree which also would be a decree in a Small Causes Court suit would be passed by a Court other than a Court of Small Causes, a thing which is prohibited by section 16 of the Provincial Small Causes Courts Act.

So far as the second point is concerned it is perfectly true that the Court in re-opening a decree has got to order restoration to the judgment-debtor of any of his properties which has been acquired by the decree-holder in execution of the re-opened decree, but this is a supplementary order consequential on the re-opening of the decree, which is provided for by the section itself. There is nothing in the Provincial Small Causes Courts Act to prevent a Small Causes Court Judge from making an order of this description. It certainly does not involve determination of interest in immovable property nor does not the suit become one for recovery of possession of any such property. Whether this portion of the decree can be executed by a Small Causes Court Judge or not is a different matter altogether. It is conceded by Mr. Banerjee for the opposite party that if any difficulty arises on this score it would be for the petitioner to get the decree transferred for execution to any other Court which is able under the law to order restoration of immovable property.

The result is that we find that sufficient reasons have not been shown for our interference with the order made by the Court below. The Rule is therefore discharged with costs—the hearing-fee is assessed at two gold mohurs.

Sharpe, J. :—I agree.

P. S.

*Rule discharged.*

*Before Mr. Justice A. G. R. Henderson.*

JYOTILAL MANDAL

*v.*

BIRUBALA DAS AND OTHERS.\*

CIVIL

1945.

February, 22, 1947.

*Bengal Tenancy Act, (VIII of 1885) section 26G—Application under, if may be allowed on terms—Clause in mortgage deed that mortgagor would only get back possession on paying fair price on buildings to be constructed by mortgagee—Such clause, if 'clog on equity of redemption'—Mortgagee, if has right to retain structure, unless the price of structures is paid to him—Mortgagee, if liable to pay rent—mortgagee, if must pay something in lieu of rent while in possession.*

A piece of land was mortgaged in usufructuary form. The land was then producing nothing. The intention of the mortgagee was to build and there was inserted a clause in the deed that the mortgagor would only get back possession of the land on paying a fair price for any structures that might be erected by the mortgagee. The mortgagor filed an application under section 26G of the Bengal Tenancy Act, to recover possession. The Munsiff, holding that the debt was discharged, made the payment of the value of structures a condition precedent to the mortgagor being put in possession. The learned Subordinate Judge held that the mortgagee had no right to remain in possession and allowed the aforementioned application:

*Held*, that a mortgagor cannot be put on terms by an order allowing an application under section 26G of the Bengal Tenancy Act.

That the mortgage having been extinguished, the mortgagee has no title to the property but in virtue of the agreement he has an equitable right to remain in possession, until he is paid for the structures, as he was induced to lay out money in structures which would enure to the benefit of the mortgagor.

That the abovementioned clause in the mortgage deed has no doubt the practical effect of a clog on the equity of redemption but it cannot be avoided.

*G. and C. Kraglinger v. New Patagonia Meat and Cold Storage Company, Limited* (1) referred to.

That the doctrine of "clog on the equity of redemption" cannot be invoked by a mortgagor against an equity which he has himself created in favour of the mortgagee.

\* Civil Revision Case No. 1269 of 1944 against the order of the Subordinate Judge of Amansol, dated the 31st March, 1944 reversing the order of the Munsiff, 1st Court, Amansol, dated the 13th November, 1943.

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Application by Mortgagee under section 115 of the Code of Civil Procedure.

Application by Mortgagee under section 26G of the Bengal Tenancy Act to recover possession.

The material facts will appear from the judgment.

*Messrs. Gopendra Nath Das, Chandra Narayan Lalk for Baidya Nath Banerjee,* for the Petitioner.

*Mr. Jagadish Chandra Ghose* for the Opposite Party.

C. A. V.

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The judgment of the Court was as follows :—

This Rule has been obtained by the mortgagee and raises a difficult point in connection with an application under section 26G of the Bengal Tenancy Act. At the time of the execution of the mortgage the land was producing nothing. The intention of the mortgagee was to build and there was a clause in the deed to the effect that the mortgagor would only get back possession of the land on paying a fair price for any buildings which might be constructed by the mortgagee. In view of the provisions of section 26G (5) the debt has now been discharged. The opposite party No. 1 accordingly filed an application under the sub-section to recover possession.

The Munsiff neither allowed nor rejected the application in direct terms. He held that the debt was discharged but put the mortgagor on terms that she was to pay Rs. 1,100 at which he assessed the value of the structures, as a condition precedent to being put into possession.

Both sides appealed. The petitioner was dissatisfied with the Munsiff's valuation of the structures but now, of course, accepts it. The Subordinate Judge held that the petitioner had no right to remain in possession and allowed the application.

Mr. Ghose raised two preliminary points in showing cause against the Rule. In the first place, he contended that the petitioner should have appealed instead of filing this application in revision. In view of the peculiar terms of the order made by the Munsiff, which neither allowed nor rejected the application, it is very difficult to say whether there was an appeal or not. I myself should be inclined to hold that the opposite party's appeal in the lower Court was incompetent. But inasmuch as the only point now taken relates to the jurisdiction of the Munsiff to make an order, a

point which can be taken either in appeal or revision, this is a matter of only academic interest.

Then in the second place, Mr. Ghose contended that a mortgagor cannot be put on terms by an order allowing an application under this section. I have no doubt that on a strict interpretation of the section this contention is correct. The learned Munsiff, holding that the opposite party was not entitled to immediate possession, should have directed her to convert the application into a plaint or, if she had not sufficient funds to pay into Court what she considered to be fair valuation for the structures, left it to her to institute an independent suit. He ought not to have made an order allowing her to recover possession. Similarly the learned Subordinate Judge, taking the view which he did, was right to relegate the petitioner to a separate suit to recover the value of the structures.

The following questions accordingly arise for consideration now: (1) Has the petitioner any other right than that of a mortgage entitling him to remain in possession? (2) Does the agreement amount to a clog on the equity of redemption? (3) If so, is the opposite party entitled to an order for immediate delivery of possession?

Now that the mortgage is extinguished it is not suggested that the petitioner has any title to the property. Mr. Das however contended that in virtue of the agreement he has an equitable right to remain in possession, until he is paid for the structures. I accept this position. As the property was not in a position to yield any profits at the time, it is quite clear that the petitioner would not have advanced the money, if he had not been in a position to build. It is equally clear that he would not have been willing to lay out his money in making structures unless he could feel assured that he would be able to recover their value without being compelled to sue. In these circumstances, as he was induced to lay out money in structures, which would inure to the benefit of the opposite party, on the inducement held out in the agreement, he has an equitable claim to remain in possession in terms thereof.

On the second point, I agree with the conclusion of the learned Subordinate Judge. He has not agreed so far as to hold that the petitioner is not entitled to recover the value of the structures. But by the agreement the opposite party is prevented from recovering possession until she has paid off a liability other than the money due on the mortgage; this certainly has the practical effect of a clog on the equity of redemption.

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But after the decision of the House of Lords in the case of *G. and C. Kreglinger v. New Patagonia Meat and Cold Storage Company, Limited* (1) it cannot be contended that any agreement, which might have this practical effect, can be avoided. It is clear that the present agreement does not come within the test there laid down. For one thing it does not even secure a collateral advantage for the mortgagee but is really for the mutual benefit of both. But whatever may be the exact position with regard to this doctrine at the present time, I am clearly of opinion that it cannot be invoked by a mortgagor against an equity which he has himself created in favour of the mortgagee. It follows from this view that the petitioner has a right to retain possession of the property independent of his right to do so as mortgagee. The application of the opposite party is accordingly liable to be dismissed.

I have already said that the petitioner accepts the valuation of the structures and the order made by the learned Munsiff. Mr. Ghose stated that he would rather do the same than be relegated to a separate suit. The petitioner obviously has no right to remain in possession of the opposite party's property without paying something in lieu of rent. I should accordingly have declined to interfere in revision if Mr. Das had not accepted Mr. Ghose's reasonable figure of Rs. 6 per month.

The Rule is accordingly made absolute, the order of the lower appellate Court is set aside and that of the Munsiff restored with this modification that a sum of Rs. 6 per month will be set off against the sum of Rs. 1,100 with effect from the date, upon which Bengal Act V of 1938 came into force.

I make no order as to costs.

P. S.

*Rule made absolute.*

(1) (1914) A. C. 25.

## ORIGINAL CIVIL.

*Before Mr. Justice Blagden.*

GANGES VALLEY BONE MILLS CO. LTD.

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*Pleading—Plea, alternative and inconsistent—Onus of proof—Each side adducing evidence—Admission by witness—Evidence—No personal knowledge—Agent contracting in his own name, liability of—Principal, agent and supplier—Contract Act (IX of 1872), section 233—Agent—Notice of termination, when reasonable—Contract Act, section 222—Indemnity—Unlawful act—Right of action in respect of indemnity, if postponed to satisfaction of liability—Commission, when payable.*

A litigant is within his rights in taking alternative and inconsistent points, as in the case of the borrower of an article belonging to the plaintiff who was alleged to have damaged that article and pleaded (a) that it was irreparably broken when he had it, (b) that it was perfectly all right when he returned it.

When each side has adduced its evidence, the question of onus of proof has lost all the great importance which at one stage it had, and would only resume its importance if on considering the evidence as a whole irrespective of which side adduced it—the Court were left in reasonable doubt on any material question.

An admission by a witness put forward by one side as a witness of truth is not to be entirely disregarded as evidence against that side merely because, the matter in question being outside his personal knowledge, his statement (if to the opposite effect) would not be evidence in its favour.

It may fairly be assumed that a man who takes on the management of a large and ancient business must make himself reasonably acquainted with its past history and if he readily admits that something happened in connection with its business before he came on the scene that admission may be evidence of considerable importance against his employers. If he has not ascertained the truth of any matter about which he is questioned he can always and easily say 'I don't know'.

If an agent expressly contracts in his own name he cannot escape liability on his contract though by section 233 of the Contract Act the other party might elect to hold his principal liable also or in the alternative. The case in which though disclosing the name and identity of his principal the agent contracts personally is not one of those cases; but in that case there is no need to presume such a contract because there is such a contract and the case is covered by the first nine words of the section.

Where a party acted or intended to act as a principal against the suppliers is not inconsistent with his being an agent as against the principal.

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In commerce the word agent does not always mean agent nor an independent contractor: *Reparte White* (1). It is not misused to describe a man who supplies a manufacturer with his materials.

A contract in which a man who distributes a manufacturer's products to the public is described as an 'agent' (and permitted so to style himself) embodying certain features is a true agency contract.

What notice is reasonable is a question of fact.

In this case both parties contemplated and it was an implied term of their contract that the defendant should in his own name enter into contracts for the purchase of bones to be produced by the suppliers and thereby incur personal liability to those suppliers: If the defendant was not authorised to contract in his own name it cannot be said that it was unlawful for him to do so. Whether the case comes under section 222 of the Contract Act depends on the terms, express or implied, of the authority conferred upon him.

The authority conferred on the defendant was an authority to make contracts for the supply of bones—bones unlimited in quantity:

*Held*, that he was authorised to make contracts with suppliers in his own name and he became entitled to an indemnity against any personal liability in respect of any contract for the purchase of bones, the moment he, his name or the plaintiffs (principals) entered into such a contract.

The defendants' right of action in respect of indemnity is not postponed to his satisfaction of the liabilities against which he claims indemnity. He is under those liabilities.

No commission was payable till the delivery of bones, but it was earned and due (as distinct from payable) when a binding contract for the delivery of future bones was made—conditionally on those bones being delivered or tendered. Whether or not at the date of delivery or tender the defendant was still the plaintiffs' agent, he was entitled, if and when his work borne its unsavoury fruit, to be paid for his work.

Suit on a promissory note.

The material facts will appear from the judgment.

*Messrs. B. C. Ghosh and Shankar Banerjee* for the Plaintiffs.

*Messrs. P. C. Ghosh and A. C. Mitter* for the Defendant.

The following judgment was delivered by

**Blagden, J.:** This matter came before me on no less than twenty eight exceptions taken by the plaintiffs to a report by the learned Senior Assistant Registrar sitting as Assistant Referee on a reference made apparently by consent and certainly without objection.

The suit in which the reference was made was commenced by the plaintiffs The Ganges Valley Bone Mills Ltd. against the defendant Kally Nath Dutt on the 20th December, 1935.

(1) (1871) L. R. 6 Ch. 397.

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The plaintiffs, according to their case as presented to me, claimed Rs. 8625 as the balance due to them on promissory notes for money lent made in their favour by the defendant, after giving certain credits not now material, to which credits it is now agreed that Rs. 423-4-0 should be added.

Their so-called "concise statement" was certainly concise because it stated the amount they claimed without the slightest indication of why claimed it.

Their plaint, which ought itself to be a concise statement of their claim, was a remarkable illustration of the remoteness which can exist between the pleadings in an action and the real questions in dispute. In its unamended form it was in fact based on money lent demanded and unpaid, and/or on an account stated, and the plaintiffs were the Ganges Valley Bone Mills Ltd.

It was subsequently amended by adding Grahams Trading Company (India) Ltd. as plaintiffs and alleging an assignment by the original to the new plaintiffs made long after action brought. Even in its amended form it contained from start to finish no reference to any promissory note whatsoever and there was good reason for this because in fact all the advances sued on had been made against promissory notes in favour of the alleged assignees (who were managing agents for the original plaintiffs) and every such note was by its terms a piece of very strong evidence in favour of the defendant. According to the original plaintiffs they were not documents on which the original plaintiffs relied, nor is this surprising.

The written statement was not what a pleading ought to be. It was neither precise nor concise. It did however aver

1. That the defendant was the original plaintiffs' "buying agent" (the present dispute mainly turns on the meaning of those two words).

2. That by the terms of his employment he was not entitled to supply bones to any other company (he could according to his pleader have supplied bones to any extent to any number of individuals).

3. That business was conducted on inter alia the following terms (meaning, I suppose, that the following were terms of the defendants' contract with the original plaintiffs to be inferred from the course of dealing between the parties).

(a) That the defendant was to get paid a monthly "retaining allowance" and "commission"

(b) That the original plaintiffs used to advance (meaning should

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and did advance) moneys to the defendant to finance purchases of bones "for supply to" the original plaintiffs.

(c) That the defendant should keep a supply of bones for the mills (meaning presumably the original plaintiffs, though the pleading did not say so).

The written statement averred that the defendant duly kept a supply of bones "in stock" (the last two words are noticeable and were not literally true, for he himself had no stock) and was ready and willing to deliver them to the original plaintiffs but that the said plaintiffs wrongfully terminated the defendant's contract of employment on the 1st January, 1935, and refused to take delivery of bones "kept ready for them", wherefore the defendant, at the request and at prices fixed by the original plaintiffs sold the said bones and made a loss of Rs. 15,567 including unpaid commission which sum he says (and his arithmetic any rate is quite correct) exceeds the amount of the claim by Rs. 6,942 and for which sum he claimed a decree against the original plaintiffs.

After the amendment the defendant by an additional written statement (which was completely unnecessary) asserted with great eloquence the elementary proposition of law that he was entitled to the same right of set off as against the assignees as he was as against the assignors and repeated his counterclaim against the latter.

Whatever the defects of the defendant's pleading—and they are many—it does at least allege that he was an agent, though he qualifies that noun by the participle "buying". It further alleges that his principals the original plaintiffs wrongfully revoked his authority: it is true that it was the words "terminated his contract of employment", which words are more applicable to a servant but, still, an agent is employed under a contract made with his principal. And it alleges that he has in consequence suffered damages.

At the trial before Lord-Williams, J. the defendant could have claimed, or the plaintiffs insisted on his exercising, the right to begin. But apparently neither party took this course and the plaintiffs in fact began and called their evidence. The defendant gave his evidence in chief, and was cross-examined in part when it became evident that he had made extremely inadequate discovery of documents. At this stage of an already quite lengthy trial the defendant consented to judgment on the claim subject to his counter claim, which latter was on the 6th July, 1937, referred.

The real and only questions left on dispute were and are (a) whether the defendant to whom the advances sued on were admittedly made was the agent of the original plaintiffs or an independent contractor, and (b) if the former, to what relief the defendant is as against the original plaintiffs entitled.

If the defendant was an agent he may have been a good agent or a bad agent, an honest agent or a dishonest agent—to this suit it matters not one iota. In one way it might have mattered a lot, namely in so far as it affected the credit of the defendant not as a party but as a witness. In my opinion the evidence given by the defendant himself in the box is as his cross-examination was never finished, worthless to him in so far as it deals with any matter really in controversy. In so far as it consists of admissions it is of value to the plaintiffs, but the value to the opposite party of an admission is not enhanced in the least if it is proved that the party making the admission is of bad character: if anything, the opposite is the case. Consequently, I think I can regard his evidence on controversial matters as being, worth as much, and as little as if it were a statement made by him not on oath to a third party and as if he had never himself given evidence at all. This being so I decline entirely to be drawn into a long discussion as to whether he did or did not cheat the original plaintiffs. The question has really nothing to do with me, but it is fair to the defendant to say that the evidence does not convince me that he did anything of the kind, and, till he stood up for what he thought to be his rights, the plaintiffs never suggested that he did. They are not seeking to discredit him by showing that he did something which (according to their case) he was perfectly entitled to do. A litigant is within his rights in taking alternative and inconsistent points, as in the case of the borrower of an article belonging to the plaintiff who was alleged to have damaged that article and pleaded (1) that it was irreparably broken when he had it (2) that it was perfectly all right when he returned it. But, like those pleas, the plaintiffs' two contentions in this case appear to me to go very badly in double harness.

Before alluding to the terms of reference and subsequent proceedings I had better here deal briefly with the evidence and the facts as they really were.

It is a paradoxical feature of the case that each side has relied mainly on the evidence adduced by the other, and with considerable reason. If and in so far as the defendants' case were true the

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defendant himself probably knew more about the facts than any man now living but his evidence was by his own advised abstention from completing it worthless to him in so far as it was disputed, and in the events which had happened it was for him to prove his case. On the other hand the plaintiffs' principal witness admitted almost every fact on which the defendant relied before me, though by no means all—in fact rather few of the facts which he admitted lay within his own personal knowledge.

It is therefore here material to observe two things. One is that each side has adduced its evidence : consequently (as their Lordships of the Privy Council have pointed out) the question of onus of proof has lost all the great importance which at one stage it had, and would only resume its importance if on considering the evidence as whole—irrespective of which side adduced it—the Court were left in reasonable doubt on any material question. The second is that an admission by a witness put forward by one side as a witness of truth is not to be entirely disregarded as evidence against that side merely because, the matter in question being outside his personal knowledge, his statement (if to the opposite effect) would not be evidence in its favour.

A well-known case before the English Court of Appeal well illustrates this. Cargo owners sued a limited liability company whose business consisted in the carriage of goods by sea for negligence whereby (they said) the defendant's ship, laden with the plaintiff's goods became stranded, damaging the cargo. The plaintiffs proposed to ask the defendants a number of interrogatories as to the state of the sea-visibility and the precautions, if any, taken by the master to avoid stranding. The defendants objected to answer them on the ground that they, the defendants, were not mariners and that no person authorised to swear on affidavit on their behalf was on board at the time. But the interrogatories being otherwise unobjectionable the Court allowed them, holding that the knowledge of the defendants' servants was their knowledge that the defendants must enquire from those of their servants who were on board and find out what the answers were. The Court would never have so held if those answers whatever they had been would have been useless to the plaintiffs.

It may fairly be assumed that a man who takes on the management of a large and ancient business must make himself reasonably acquainted with its past history : and if he readily admits that something happened in connection with its business before he came

on the scene that admission may be evidence of considerable importance against his employers. If he has not ascertained the truth of any matter about which he is questioned he can always and easily say "I don't know".

Bearing those considerations in mind the following facts appear perfectly clear.

At all material times prior to 1935 the plaintiffs were large consumers of bones.

For many years prior to 1935 a contract of some sort has subsisted between the original plaintiffs and the defendant.

By its terms the defendant was to get the original plaintiffs some of the bones they wanted.

That contract (whatever it was) the original plaintiffs purported to determine first without notice and then, on the defendant's protest, on a month's notice, with a view to closing down their business.

Such a contract was terminable by either side as reasonable notice and the defendant never seriously disputed that a month's notice was reasonable in point of time. Whether (if in substance the contract was one of agency) it would be terminated on that notice without any indemnity to the agent against existing commitments is another question.

The defendant was certainly remunerated in part by salary and in part by commission; according to the plaintiffs' case (though their principal witness seems to have had his doubt about it) he was also entitled to make any profit he liked and could at their expense.

I can understand paying a man a periodical sum of money for the first refusal of his goods, and making that sum of money larger than it otherwise would be if you want him to keep his mouth shut about something thoroughly dirty in your own conduct—as was, unfortunately the case with the plaintiffs. But I can see neither rhyme nor reason in paying a man a percentage over his price if he is merely selling you goods and getting out of you the best price he can. On the other hand, paying an exclusive agent salary and commission is perfectly intelligible and not at all uncommon.

It was not contemplated that the defendant would personally perform his contract by running about India scratching for bones.

It was contemplated that he would procure others (hereinafter called "suppliers") personally or vigorously, to find bones.

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Since it is the hope of reward that sweepers labour the suppliers could scarcely be expected to supply bones out of natural love and affection for the plaintiffs or for the defendant: the suppliers therefore had to be bound by contracts, and these contracts the defendant had to effect.

The defendant might have done so either in his own name or as agent for and in the name of the original plaintiffs. In fact he adopted the former course.

Had he adopted the latter course and been duly authorised to do so he would have incurred no personal liability to the suppliers whatever thereafter happened. (Contract Act section 230). He therefore certainly would have discovered, from time to time, that suppliers before contracting through him with the original plaintiffs would have demanded to see his credentials. In practice he would have had to have held a power of attorney or other similar document, and it is common ground that he held none.

From the foregoing facts alone, apart from anything else, it follows as the day the night that both parties contemplated and it was an implied term of their contract that the defendant should in his own name enter into contracts for the purchase of bones to be produced by the suppliers and thereby incur personal liability to those suppliers.

It is immaterial whether, as in some if not all cases he undoubtedly did, he at or before the time of contracting disclosed the existence and name of his principals (if such they were). If an agent expressly contracts in his own name he cannot escape liability on his contract though by section 233 of the Contract Act the other party might elect to hold his principal liable also or in the alternative. The latter part of section 230 says that in certain cases a contract to the effect that the agent shall be personally liable shall be presumed. The case in which though disclosing the name and identity of his principal the agent contracts personally is not one of those cases; but in that case there is no need to presume such a contract because there is such a contract and the case is covered by the first nine words of the section.

That the defendant acted and I think was intended to act as a principal as against the suppliers is not in the least inconsistent with his being an agent as against the original plaintiffs (Contract Act section 230 second para clause (2) and illustration to section 233 of *Calder v. Dobell* (1) from which case it

(1) (1871) L. R. 6 C. P. 486.

seems that even express instructions not to disclose the principal are not inconsistent with the relationship of principal and agent).

Assuming that the defendant was the original plaintiffs' agent, the fact that he contracted in his own name worked, in the events which have happened, no detriment to the original plaintiffs. If he had done so in their name they would have had to face multitudinous suits by the suppliers to which they would have had no defence as it is they have to face one counterclaim by the defendant and have a remedy over in case after satisfying a judgment in the defendant's favour they are sued by anyone of the suppliers. That is the only difference it made.

The promissory notes which I have already mentioned also refute the plaintiffs' argument that a contract by a party in his own name is inconsistent with his being really an agent for the promisee in the case of each of them was Graham Trading Company (India) Limited (the second plaintiffs) who, as I have said, acted as "managing agents" for the original plaintiffs.

If the plaintiffs' argument on this point were well founded their claim against the defendant would have been entirely destroyed. On their face the notes are flatly inconsistent with any loan by the Ganges Valley Bone Mills Limited to the defendant, and if there were no such loans that company had no rights which it could assign to anyone.

Actually, the notes came into existence largely because the original plaintiffs not only did not contemplate but did not desire that the plaintiff should establish privity of contract between them and the suppliers. On the contrary, they wanted the bones of deceased creatures without being bothered by direct dealings with a large number of resurrection-men. Not knowing the latter they did not know who of them could and who could not be trusted; but they must have known that as the suppliers were not likely to be men of large capital the latter would require from time to time payments in advance on account of bones thereafter to be supplied. The defendant could hardly be expected always to make these advances out of his own pocket, but if they put their hands in theirs they desired to be reasonably certain that the defendant would use the money they got therefrom for the single purpose of making advances in respect of future bones. These considerations moved them quite reasonably and properly to pay money to the defendant from time to time on the terms contained in these on demand notes. The outstanding balance of those moneys makes

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up the plaintiffs' claim, and of those terms are recited that the money referred to had been advanced for the specific and exclusive purpose of purchasing bones "for us" (the plaintiffs).

The words "for us" are to my mind most important. They are words of the plaintiffs' own choosing and are neither words of art nor, like the word "agent", equivocal. They are not synonymous with the words "to be offered to us" or with any words to that effect. They are consistent with agency and flatly inconsistent with the relationship of customer and tradesman, even if by special contract the customer is to have the first refusal of every article the tradesman has or shall have in stock.

It is true that when the defendant made a written contract with suppliers he sometimes if not always misdescribed himself as a "Merchant". But once it is established that he was contracting in order to get bones "for" the plaintiffs and that the latter knew that he would and desired that he should do so in his own name, it is utterly unimportant how in doing so, he described himself. The other facts in my opinion clearly establish that the original plaintiffs had that knowledge and desire, and anyhow this misdescription is more than counterbalanced by the admitted fact that at least as long ago as 1929 the original plaintiffs in writing to third parties were wont to allude to the defendant as "our agent Babu Kally Nath Dutt".

When the original plaintiffs terminated or purported to terminate their contract with the defendant the latter sought and obtained from the former a testimonial which alluded to him on warm terms as an old and faithful "servant". It is common ground that he was not then and had not for many years been their servant. But there is a lot more in common between the relationship of master and servant and that of principal and agent (especially when the agency is exclusive) than there is between that of principal and agent and that of customer and tradesman. Who, in his senses, would describe his grocer or tobacconist as his "faithful servant", even if the tradesman had a quarter of a century ago been his bearer?

Some years before this dispute arose the plaintiffs arrived at what with a curious delicacy Mr. Clements called "an understanding" (as distinct from an "agreement") with their competitors, fixing the maximum prices they should each pay for their raw materials. This has been called before me the "gentlemen's agreement". I suppose because the plaintiffs in fact broke it. The rates or maximum rates the defendant was to agree to pay were

fixed from time to time by the plaintiffs and were in excess of the rates specified in the so called gentleman's agreement. The plaintiffs themselves were at some pains to conceal this fact from any who might inspect or have access to their books, for one can hardly believe their story to the effect that one of their senior officers himself had personally kept and wrote up a book which showed the true rates they were paying merely for the purpose of giving a rest to their overworked clerks ; and this lends strong probability to the defendant's story that he was asked to conceal, and to get the suppliers to conceal, the rates that were really being paid, for otherwise the plaintiffs' own concealment of their disreputable conduct would have been a vain thing. Be that, however, as it may, it seems quite clear that the defendant was the recipient of their confidential information that the plaintiffs (whose principal representatives, by the way, were known as "The Sahibs") were habitually breaking their pledged word. It is often necessary to confide such unsavoury secrets to one's agent : but it would be very odd to entrust an independent contractor with information of the sort.

Save when otherwise stated the foregoing facts are all, when disputed on the pleadings, either appear from a document which is not disputed or are admitted in evidence by the plaintiffs' witness Mr. Clements (who seems to have had a deeply ingrained habit of telling the truth) or are an inference from facts of one or other of the above categories which in the light of the other evidence in the case seems to me unavoidable. I may here add, by way of explanation of some of the correspondence and figures that in addition of the main contract between the original plaintiffs and the defendant there was a subsidiary contract of short duration under which the defendant was to act as the actual custodian of bones at or of the plaintiffs' mills which was not then in use as a mill, but only as a store. Nothing now turns on the subsidiary contract.

The agreed correspondence had by itself and without regard to surrounding circumstances is, however, decidedly helpful to the plaintiffs. It is certainly in their favour that at no stage did the defendant stick out for more than a month's notice as being reasonable notice for the determination of his main contract whatever it was. But the plaintiffs seem to get an even greater advantage from the correspondence. They say, quite correctly, that till his written statement (even if then) the defendant never in terms said :—"I am your agent and you are my principals : as your agent I have at

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your request and for your benefit, incurred certain personal liabilities in respect of goods which I have purchased for you. If you now revoke my mandate you must save me harmless against those liabilities". But in considering what inference to draw from this at least four matters have to be borne in mind : first, the defendant though he had a good knowledge of English was not writing in his own mother-tongue : secondly, he was not a man of law—or at least not more a man of law than the average citizen of Bengal—and doubtless would have expressed himself much better and more forcibly if he had been. Thirdly I doubt if he at once realised the full iniquity of what the plaintiffs wanted to do. They wished, having got the defendant to sign their promissory notes, to sue him as a borrower on the expressed consideration for those notes—though naturally, they were not keen to rely on the notes themselves, which disclosed that the defendant was not a borrower at all but a person (whether an agent or not) who took their money on the terms that he was to expend it on the purchase of goods (to use their own expression) "for" them—not "to be offered to" them but "for" them. They wished to treat him as a borrower of money repayable on demand without regard to the fact that he was bound to expend that money on the purchase of goods "for" them, and had in fact done so : and to leave him and having repaid the money (he received) to stand any loss that might arise on a resale of the goods, which they no longer wanted because they were closing their business : which fact, because it reduced competition for the goods, made a loss on their resale of those goods inevitable.

Partly because I am not a judge of morals and partly because I am not sure of my ability to do so adequately I do not attempt to express my own opinion of this conduct of "the Sahibs". But I hope I am not being too flattering to the generality of my own countrymen if I say that this is hardly the way in which an educated native of Bengal would expect to be treated by natives of the United Kingdom.

The last factor to be considered is the apparent strength of the forces marshalling on each side during the period of this correspondence. I have often thought that even in England undue importance can be attached to an appearance of pusillanimity in his letters before action evinced by (say) a railway ticket-collector who has the misfortune to quarrel with his employers. No one blames a mouse for not standing its ground as against a cat. Here the presumable disparity of forces is often even

greater. In this case the defendant is one of a race whose country off and on for centuries has lain under the power of successive conquerors. Heredity is often stronger than environment and, undoubtedly, many otherwise intelligent members of such a race cannot realise that the latest conqueror up to date has at least given to this country the benefit of a law before which all men are equal.

All these factors have in my opinion to be borne in mind in considering such correspondence as the present. Moreover though the defendant would have been much wiser if he had said boldly and plainly what his contention was, it is fair to observe that he was hinting at the contention from a very early stage, and at the outset of the correspondence wanted to get the testimonial already mentioned out of the plaintiffs: to which end an immediately truculent attitude would not have conduced.

From the very nature of the contract between the original plaintiffs and the defendant and the magnitude of the plaintiffs' requirements it is evident that the contracts the defendant was required to effect would mainly be contracts for the sale of future goods. Bones, except in times of war and epidemic, do not cease to be required by their original owners at any particular season of the year, and even at such places as hospitals or slaughter houses there is presumably no vast stock of them available for cash against delivery over the counter. The original plaintiffs must have known that people—either the suppliers or their sub-contractors—would have to search India for vacant and available bones and that to ensure a supply it would be necessary to guarantee a demand by contracting to purchase the future fruits of these peoples' labour. That in fact is what happened, and the plaintiffs if they had thought about the matter must have realized that if the original plaintiffs terminated the defendant's contract on a month's notice something had got to be done about contracts outstanding at the end of the month, unless indeed (as they contend) he was a mere vendor of bones bound by special contract to offer his wares to the original plaintiffs before anyone else, the responsibility for this was that of the original plaintiffs, "for" (to use their own word) whom the bones had been purchased. They did not take the bones or pay for them after the expiry of this one month's notice. What, I wonder, did they think was going to happen about them? They ran into quantities so large that it would be absurd to suppose the defendant would thankfully make soup of them for his own household or give them

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away to his own or other dogs. In fact he sold them to one of the original plaintiffs' former competitors at the best price he could get from them. An attempt was made to show before me that the plaintiffs were in general quite unaware that he was doing as—but it was largely ludicrous, because for years vast numbers of bones had been delivered by rail, the railway receipts being always made out to the original plaintiffs or order. Such was the case with those of these bones which came by rail. No one could have dealt with those bones without at least the purported signature of the original plaintiffs and it is not suggested that the defendant forged that signature. I think it quite plain that the letters of the plaintiffs before me disclaiming interest in particular consignments of bones, which might suggest that they were interested in the other consignments and unaware of what was happening to them, came into existence merely because the ultimate purchasers wished to have some evidence in writing that their former competitors (the original plaintiffs) were not interested in those bones. Actually I am confident that the original plaintiffs knew perfectly well (or would have done it, contrary to modern practice, they had thought) that the defendant was disposing of the outstanding bones.

Naturally, as the original plaintiffs, one of the largest consumers in a limited market, were out of the running, the price of bones fell, and as a result of the original plaintiffs' decision the defendant sustained actual or potential loss on the incomplete transactions which is the basis of his commission.

I return now to the hearing before Lord-Williams, J. His Lordship by his order of the 6th July, 1937, directed a reference. The Referee was to take into account the evidence already given before his Lordship; to proceed on the basis of the pleadings in the suit; to treat the evidence already given as given in the reference; and to enquire as to

(1) The quantum of damages (including loss of commission) if any suffered by the defendant:

(2) The liability if any of the plaintiffs to pay the same or any portion thereof:

(3) The amount of unpaid commission if any due to the defendant.

Lord-Williams, J.'s order is not on its face a consent order but in fact it must have been one and it was never appealed against. This order of the 7th July 1937 was made with a view to saving time and expense yet it was not allotted to the Official Referee till 5th

May 1938 or transferred to the learned Assistant Referee till 5th July 1940 and it actually reached him for the first time on the 8th May 1941.

One reason for this was the parties' disregard of Lort-Williams, J.'s order which clearly provided against a complete re-opening of the pleadings and starting the suit *de novo*. The defendant took no notice of that at all and on the 21st June 1938 (nearly a year after the order of reference) filed a lengthy statement of facts, the main difference between his case as therein pleaded and as pleaded in the written statement consisted in more explicit allegations of agency and averments of three express oral agreements to indemnify him entered into after the dispute arose.

The utter inutility of the document is demonstrated by paragraph 22 thereof, whereof the defendant craved "leave to add, to alter the State of Facts as and when he may be advised" in other words to amend it at any time without leave.

Apparently a direction that money should be wasted in this way was obtained from the Official Referee on the 30th March 1938. But the Official Referee had no power to revise Lort-Williams, J.'s order and it does not appear that either party made any protest against his doing so—probably his attention was never called to the clear, simple, and, if I may say so, sensible directions the learned Judge had already given.

Instead of applying to strike out the Statement of Facts the plaintiffs filed a lengthy Counter Statement of Facts and took out a commission to examine again in Bombay (to which port he had meantime migrated) their principal witness, he being the individual alleged to have made the oral agreements. The defendant scored over this because he obtained more, and valuable admissions, from him. But the onus of proving the oral agreements or any one of them was on the defendant. He made no attempt to discharge it before the learned Assistant Referee and by his counsel before me, abandoned these allegations. As there was no evidence in support of them and the defendant, the only person on his side who could have given that evidence, did not return to the witness box, he could hardly have done otherwise. In any event they were quite unnecessary to his case. While I must and do assume that there is no truth in them at all there is behind them this substratum of fact, namely, that the interviews at which they are alleged to have been made did take place and no doubt at those interviews comfortable words were spoken to the defendant on behalf of the plaintiffs who, in familiar phrase "wanted no trouble".

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On the new pleadings issues were raised and settled (whatever that means) not by Mr. Ahmed, but by the Official Referee. This was a completely unnecessary proceeding as the learned Judge had already told the Referee the questions into which he was to enquire.

During a long and, I have no doubt, extremely tedious hearing before the learned Assistant Referee much evidence was taken, and the patience of the learned Assistant Referee must have been sorely tried by the sort of questions which were from time to time put to the witnesses. The best example (perhaps) is the following, put in cross-examination to a young man called Kartik Chandra Sil the defendant's grandson and assistant.

"Q. Was there any privity of contract between the dealers of Babu Kally Nath Dutt and the Company? (meaning the original plaintiffs) "

It would have been as sensible to ask a sweeper whether he agreed with Einstein's theory of relativity. I am often told that in this country the Civil Procedure Code is on every infant's tongue but even if this be it does not follow that all or any layman in Bengal are so familiar with the intricacies of the law of contract that they could understand this question, and it would be an ill day for the legal profession if they were. That the particular witness did not understand it is self-evident from his answer to this remarkable conundrum which was

"A. No. These contracts were on behalf of the Company."

This was clearly a contradiction in terms. A less patient tribunal might have made a fairly emphatic protest against such waste of time as this, but if the learned Assistant Referee was at fault in not doing so I can only say that judicial patience is, at its very worst, a good fault. Yet one finds as part of one of the 28 specified exceptions to his report (and, I may say, the plaintiffs seek to leave open to themselves an indefinite number of unspecified grounds for objecting to it) the following words, namely :—

"6. That the learned Assistant Referee entirely failed to take cognisance of the evidence".

On the 24th April 1942 the learned Assistant Referee filed his report. I do not propose to read it, but its report obviously prepared with great care and not the least of its virtues is that it is succinct. Of this virtue, amongst many other matters specified and unspecified in their present petition, the plaintiffs complain. I do not think they would have done so if the report had been in their favour which it was not. The complaint of mere brevity against an

expression of opinion by a tribunal agreed on or at all events not objected to is very remarkable: the shortest judicial decision consists either in the words "Out" or the words "Not out" and though I have heard its merits discussed I have never heard a complaint that its reasons were not fully stated. This complaint seems to proceed on the assumption that any matter which a judicial tribunal does not expressly mention in its judgment it must be deemed to have deliberately ignored or negligently overlooked. No proposition could be more unfounded.

The learned Assistant Referee reached the following conclusions

1. That the relationship between the original plaintiffs and the defendant was that of principal and agent.

2. That the defendant was entitled to

(a) Rs. 1753-11-9 on account of commission

(b) Rs. 4273-0-0 by way of indemnity.

Rs. 423-4-0, as I have already said has to be added to these sums.

On the facts and evidence I have already set out it seems to me abundantly clear that in the first conclusion he was right.

Objection No. 8 says in general terms that he was wrong. Objection No. 1 says that he misconceived the effect and nature of Mr. Clement's (the plaintiffs' principal witness') evidence.

Objections Nos. 2, 3 and 4 amplify this, the plaintiffs' contention being that the words "buying agent" mean "vendor" or "stockist" (the responsibility for the introduction of the latter word into the case is in part at least that of the pleader of the written statement).

We all know that in commerce the word "agent" does not always mean "agent", but I cannot understand why it is to be assumed that even if given a qualifying epithet it necessarily or probably means "principal". The abuses to which the English language is subject in commerce are indeed many and distressing. "Live Herring", for example, means among fishmongers a dead, but uncured herring, in other words a "fresh" herring, often (unhappily) none too fresh; but even among fishmongers it does not mean a turbot, and I should have thought that in any contract the words "man-eating tiger" connoted a tiger of some sort rather than that a species of sheep. The facts indicating that in this case the words "buying agent" were in fact used to mean (as one would expect) an agent who buys I have already set out. The learned Assistant Referee drew attention to some of them and rightly

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observed that it was not necessary to multiply instances. I have done so, to some extent, because of the oft-repeated allegations that he misunderstood or did not consider the evidence.

Apart from that evidence, my attention has been drawn to several cases in which the Courts have recognised that the word "agent" does not necessarily mean "agent" the most interesting is *Ex parte White* (1) which shows that this misuse of the word is much older than I should have supposed especially as the most notorious offenders to day are the motor trade, the wireless trade. But as I have tried to point out, it does not follow that the word "agent" with whatever epithet adorned, necessarily or even probably means "independent contractor". Moreover in no single reported case and in no single instance which either learned Court or I could think of from our knowledge of the world, has the word "agent" been misused to describe a man who supplies a manufacturer with his materials. As far as I know, the misuse invariably occurs in relation to man who distributes a manufacturer's products to the public. A contract in which the latter is described as an "agent" (and permitted so to style himself) embodying certain features not unusual is a true agency contract, has certain solid advantages both to producer and distributor. The former, for example, is enabled to control the retail price to some extent: the latter gets some freedom from competition; and in so far as the unthinking public are led to believe that they are dealing with the producer himself through his representative—that they are not paying middleman's profits;—and that they will, if the article they buy proves defective, have a direct right of action against the producer, both score. Actually the last mentioned right of action is generally and very wisely excluded by a printed form handed to the purchaser, but in these days when so many people can read hardly anybody ever does so. But none of the above advantages accrue from misapplying the word "agent" to an independent contractor who gets the producer his raw materials: On the contrary the effect of so doing might well be to enable the so called "agent" to give a good title, by sale, to a competitor of material the producer himself, most urgently requires, and at the same time to leave the latter, open to the possibility of a unit founded on estoppel by the seller of the material. Some such risks are inevitable unless the manufacturer personally purchases the materials he wants. But they do not seem to me decreased by his purchasing from a middleman and falsely calling him an "agent" rather than

(1) (1870-71) 6 Ch. App. Cas. 397,

employing a person who really is an agent and, as such, entitled to no secret profit, and generally speaking incapable of getting a good title to the goods he buys for his principal. It seems to me that for the purpose of getting his own supplies the manufacturer who does not wish personally to buy his raw materials has everything to gain and nothing to lose by adopting the latter of these two courses especially when he makes with his agent a special contract to the effect that he, the agent, should contract in his own name and be personally responsible for any unjustified credit he may give.

Exception 10 is apparently intended to mean that as a matter of law "buying agent" means "vendor". But for this startling proposition there seems as I have said to be no authority whatsoever.

Exception 9 says that the learned Assistant Registrar failed to notice that the defendant's case of agency had been "subsequently developed". As it does not say to what event the development was subsequent it is meaningless, but if it refers to the correspondence and gradual improvement in the manner in which the defendant has pleaded his case it is a legitimate comment affecting the weight of the evidence, but no more. I have already expressed my views on it.

Exception 7 alleges that the Assistant Registrar has wrongly construed the documentary evidence. On those documents which the plaintiffs or one of them created the defendant was again and again (a) described as "our agent" and (b) entrusted with money to buy bones "for us". I see no misconstruction of these documents in assuming that they mean what they say, even if in other documents the defendant chose to call himself a "merchant". Again the facts set out in exception 5 merely prove, if they prove anything, the admitted fact that the defendant contracted with third parties in his own name and bore some losses himself. The former even if expressly enjoyed does not disprove agency [*Calder v. Dobell supra* (1)] and the latter if by the express or implied terms of his mandate the defendant was bound to bear those losses is irrelevant.

If the facts stated in exception 6 are true they prove only that the defendant was not an honest agent. This as I have indicated is at the moment quite irrelevant even if it happens to be true.

Exception 10 is actually, I think, well founded but it does not affect the result. It is true that in his written statement the defen-

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dant complained of the wrongful termination of his agency but he did not say in what way it was wrongful. I do not propose to pay attention to his own subsequent and wrongful pleading. Prior to his written statement he never complained that the notice (of one month) on which the original plaintiffs determined his mandate was too short.

It would be unreasonable to hold on the one hand that the contract between the original plaintiffs and the defendant was intended to last for their joint lives or on the other that it was terminable at will.

If so it must have been terminable on reasonable notice. What notice was reasonable is a question of fact. At first blush one month's notice strikes me as being too short, but it did not so strike the defendant, and his active acquiescence in that period of notice as shown on the correspondence is the only evidence on the question which I have, therefore the conclusion that the plaintiffs should have given longer notice (if that is what the learned Assistant Registrar intended to express) appears to me unfounded. The original plaintiffs' real breaches (if any) of this contract consisted, I think, not in revoking the plaintiffs' mandate on too short a notice but in refusing to indemnify him against obligations already incurred by him in pursuance of that mandate and/or in refusing to pay him commission already earned. It makes no material difference in which, if either, respect they broke their contract. For they either did or did not break it; if they did I still have to consider in what liability they are involved by that breach while if they did not, the defendant is entitled to nothing.

Exception 14 also has some substance but no materiality. It is true that on the admitted and proved facts the original plaintiffs in one sense, owed the defendant no duty to accept and pay for the bones he bought. I mean that the defendant could not under any section of the Specific Relief Act have compelled them to do so. But whether if they did not accept and pay for the bones which had bought "for" them they were not bound (a) to hold him harmless and (b) to pay his commission, on the like amount as damages for preventing him earning it, is quite another question and that question is raised in varying language.

Exceptions 11, 12, 13 and 15. Of these Exception 12 complains that the Assistant Registrar has not discussed the cases cited to him on behalf of the plaintiffs. But if he reached a correct conclusion this appears quite immaterial.

The question of indemnity or "differences" could not arise if the

defendant had purchased the goods in question in the name of the original plaintiffs (Contract Act, Sec. 230). In fact he admittedly did not do so, and I think was authorised not to do so. Even assuming that I am wrong about the latter his not doing so involved, as I have already pointed out no detriment to the plaintiffs.

The relevant law is stated in almost startling clarity in section 222 of the Contract Act which says "The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him."

It could not be argued that even if the defendant was not authorised to contract in his own name it was unlawful for him to do so, and there is not evidence or serious suggestion that he was forbidden to do so. Does he then come within this section?

Naturally the question depends on the terms, express or implied, of the authority conferred upon him. Let me, in considering it, take two simple, ordinary cases. I employ an agent to find me a house in which I shall be prepared to live, never agreeing that he shall be my only means of finding what I want or that I will take a house which I do not really like. In the hope of earning his commission he advertises my requirements in the press. Independently of his efforts I hear of the very house I want, take it and revoke his mandate. Obviously he has no right to claim from me an indemnity from the claims of the newspapers concerned; I only authorised him to find me a house I liked, and the means he adopted to that end is his affair. He was not authorised to advertise at my expense and his expenses in doing so without result are a business loss which he has suffered, just as, in the present case, the defendant made certain advances to suppliers out of his own pocket which he did not in all cases recover, he cannot charge those to the plaintiffs. But suppose I instruct the agent to purchase for me (without disclosing my name) a house which he thinks will suit me. What is to happen if for some reason (however good) I revoke his mandate after he has in his own name entered into a binding contract to buy much a house for me; the answer is easy. I conferred on him an authority and he has lawfully acted in its exercise: It is too plain for argument that the section confers on him a right to indemnity. It can make now no material difference if he contracts in his own name without being either told or forbidden to do so. If he had contracted in the principal's name the loss falls on the principal directly: If in his own name it so falls indirectly: The loss is the same either way.

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No such consideration of personal taste as apply to a house apply to bones to be manufactured into bone manure. There is no evidence about it, but I understand from the defendant's learned counsel that the bones of elephants and men would not suit the plaintiffs: Subject to those possible exceptions the bones of other mammals were all, literally, "grist to the mill". The authority conferred in the defendant seems to have been simply an authority to make contracts for the supply of bones—possibly not elephantine or human bones; but bones unlimited in quantity—I think he was authorised, and he was certainly not forbidden, to make those contracts in his own name. Consequently he became entitled to an indemnity against any personal liability in respect of any contract for the purchase of bones the moment he his name or the plaintiffs, entered into such a contract. If in fact human and elephantine bones were outside his mandate it matters nought, for it is not suggested that he bought any human or elephantine bones.

I do not think his right of action in respect of this indemnity is postponed to his satisfaction of the liabilities against which he claims indemnity. He is clearly under those liabilities. If the suppliers should after all not enforce their claim against him they would not be cheating the plaintiffs but would be making the defendant a present. If they should under section 233 of the Contract Act seek to enforce them against the original plaintiffs must at least the latter have a remedy over against the defendant if they have satisfied any judgment he may now obtain.

But the defendant was bound to try to reduce the damage he has suffered to as low a figure as he reasonably would—as every one who complains of a breach of contract is. The learned Assistant Registrar (who was almost accused before me of bias in his favour) has, rightly, found that he did not do so, in that he disposed of the bones to one person without seeking the competition of other interested persons. The learned Assistant Registrar made a most ample allowance for that, and the defendant accepts his report.

Objection 15 which complains of his finding as regards differences between contract and sale price (totaling subject to that allowance, Rs. 4273) is in my judgment quite unfounded. It makes no difference whether this is called "damages" or "indemnity".

Exceptions 16-18 inclusive deal with the claim to commission. This consists largely of mutually repugnant statutory and appear

to be founded on a misapprehension on the part of the plaintiffs as to the effect of an admission as to a particular item made by the defendant's counsel (which has been duly allowed for) and of what the learned Assistant Registrar in consequence did. Neither the defendant's counsel nor the Assistant Referee is in my opinion in the least to blame for that misapprehension.

Exception 19 complains that the Assistant Referee does not indicate "the basis" of his "finding regarding commission"—whatever that means. But I think he has done so. He has expressly found what were "undisputed terms of the defendant's agency", true even the use of the word "undisputed" is itself disputed. But substantially the terms the learned Assistant Referee sets out were the undisputed terms of the plaintiffs' employment and the only disputed question about them affecting liability was whether by those terms the defendant was or was not an agent. Given that he was, a conclusion at which the Assistant Referee had already, in my view rightly, arrived, it follows that his description of those terms was quite accurate.

Exception 20 raises in a rather obscure form a substantial question as regards the counterclaim to commission. As I have said it was not, apparently, disputed that the notice to terminate the defendant's mandate was reasonable. It seems to me that the plaintiffs' strongest defence to the claim to commission lies in the contention raised that no commission becomes *due* till the bones were actually delivered: that it was earned by producing bones, not merely by contracting for them. But that, I think, is a wrong way to look at the matter. Certainly no commission was *payable* till that delivery, but it was earned and due (as distinct from payable) when a binding contract for the delivery of future bones was made—conditionally, of course, on those bones being duly delivered or tendered. Whether or not at the date of delivery or tender the defendant was still the plaintiffs' agent, he was entitled, if and when his work bore its unsavoury fruit, to be paid for his work. The matter admits of an easy test: suppose his employment had terminated not by notice but by his death while the plaintiffs were still carrying on their business. It would be monstrous to hold that the plaintiffs could take the benefit of the dead man's services without paying for them. That by the time of delivery the defendants for their own reasons no longer wanted the bones and had purported to close their business can make no difference. I say "purported" because a person cannot be heard to say that he is no longer in business unless and until his

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business debts are paid. Apart from that doctrine, if a box of cigars is sold and delivered to me on credit I cannot, at the expiry of the period of credit, insist on returning the cigars and refuse to pay for them merely because before I opened the box my doctor has advised me to give up smoking. Consequently, though I prefer to base my decision on the ground not that the plaintiffs' mandate was wrongfully terminated but that, though it was lawfully terminated, the commission now in question had by them already been earned, I agree in the result at which the learned Assistant Referee has arrived.

Exception 21 complains that the Assistant Referee has not specifically dealt with and answered the issues before him. He has in my view answered them though, it is true, he has not done so specifically as though they were interrogatories. I see no reason to reject or vary his report for that reason, especially as the issues were settled on pleadings wherein ought not to have been delivered at all.

Exceptions 22, 23 and 24 are all concerned with one Surendra Nath Bala supplier with whom the defendant contracted in his own name. Nos. 22 and 23 are fine examples of illogicality. The first two of them asserts in effect that if the defendant was an agent and Surendra Nath Bal was a principal the latter must have been the defendant's principal, consequently the defendant's claim if any lies against Surendra Nath Bal and not against the plaintiffs. I do not propose to waste time in exposing a fallacy so obvious.

Exception 24 raises in a new form and with special reference to Surendra Nath Bal the argument as to indemnity with which I have already dealt. In contradiction to exceptions 23 and 24 it presupposes that Surendra Nath Bal was not the defendant's principal.

Here I may say with reference to exceptions 24 and 27 that the Learned Assistant Referee believed the evidence of Surendra Nath Bal. I do not feel bound by that conclusion. I am not sitting on appeal from the learned Assistant Referee, and have a completely free hand as regards questions of fact—freer even than that of an appellate court. But I still must bear in mind that the Assistant Referee saw and heard the witness and I have not done so. I see no adequate reason to disagree with the learned Assistant Referee's conclusion. If Surendra Nath Bal is speaking the truth the defendant is liable to Surendra Nath Bal.

Exception 25 says in effect that the onus lay on the defendant

and he has not discharged it. It is true that the onus lay on the defendant, and, if the plaintiff had insisted on the defendant's beginning and had themselves adduced no evidence there would be great force in this exception. If they had taken this course they might have been completely successful. But this course involved certain obvious risks which (under advice) they did not choose to run and they cannot now complain if as a result the defendant has proved his case largely from their own witnesses and their own documents.

By exception 26 the plaintiffs complain that the learned Assistant Referee did what Lord-Williams J. told him to do, and treated the evidence given at the trial by the defendant as given on the hearing of the evidence. I think the defendant might have had some grievance if the learned Assistant Referee had been as disobedient to the learned Judge's order as were the parties themselves and the Official Referee. I think it is a pure matter of opinion—that in the circumstances the learned Assistant Referee attached undue weight to the defendant's evidence; I, personally, attach no weight to it except in so far as it deals with matters not really in dispute—for example, I have considered it as providing the necessary date to make intelligible and undisputed documents and so on. But as material for deciding questions really disputed it is in my view worthless. Still I think the learned Assistant Referee was perfectly right to obey his orders and could not perfectly have, as the plaintiffs suggested, "deleted" evidence which he had been ordered to consider. Even if he wrongly obeyed his orders that does not, as the plaintiffs contended, "vitiate" his report: there was abundant other evidence to justify his conclusions and in my opinion they were, save as otherwise already stated, correct (see Evidence Act, section 167).

The twenty-eight and last exception is an example of a practice charmingly described in a Burmese expression familiar to the Criminal Appellate Bench at Rangoon and usually translated as "abusing generally". It calls for no express refutation.

Various other questions have been discussed before me but I do not think I should either allow the plaintiffs to go outside the ground covered by their exceptions or take up public time in discussing a great deal of detail as to figures. One legitimate object of a reference is to prevent a long investigation of detail taking place in open Court—not because learned Judges have any right to immunity from boredom, but because litigants should not be prevented from bringing before a Judge important questions

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(which he personally should and must decide) by reason of his being occupied by an enquiry which can be conducted elsewhere just as well, or better, by a subordinate officer. I do not propose to frustrate that any further than circumstances and ingenuity have already frustrated it.

Suffice it to say that I see no error of principle or of detail in the result at which the learned Assistant Referee arrived and in accordance with his report together with the further amount due to the defendant which I have mentioned there will be judgment for the defendant on his counterclaim for Rs. 6449-15-9 with simple interest thereon at 6% per annum from the 6th July, 1937, (the date of the reference and of the judgment in the plaintiffs' favour on their claim) till realization.

As to costs, the plaintiffs should have the general costs of the suit down to and including those of the hearing terminating on the 6th July, 1937, and of the perfecting of the order then made. I allow no costs to either side in respect of the drawing up and filing of the Statement of Facts or Counter Statement of Facts or of the commission to Bombay. Subject to the foregoing I award to the defendant the costs of the proceeding subsequent to the 6th July, 1937, including those of the proceedings before me as of a hearing. The amounts payable by the plaintiffs to the defendant and vice versa under Lord Williams J's and my order are to be set off each against the other and execution is to issue only for the balance.

Certified for two Counsel.

No execution till taxation.

The money deposited to stay in the hands of the attorney who has got it, meanwhile.

The matter to be treated as on the list for further directions.

Liberty to apply in case there is any difficulty in working out the order.

The report is confirmed.

A. T. M.

*Report of Assistant  
Referee confirmed.*

## CIVIL REVISION.

*Before Mr. Justice A. S. M. Ahrum and Mr. Justice  
P. Chakravarti.*

DURGA DAS KUTHI

v.

RAM DAYAL SAMADDAR AND OTHERS.\*

*Deposit—Bengal Tenancy Act (VIII of 1885), section 170—Order for sale,  
when comes to an end—Several under-tenure-holders making valid and  
timeous deposits—Preference—Equitable principle.*

The order for sale referred to in sub-section (2) of section 170 of the Bengal Tenancy Act, by which is meant the initial order for execution of the decree by sale made under Order 21 rule 17 of the Code of Civil Procedure, is not extinguished automatically as soon as a deposit, purporting to be of the decretal dues and costs is made, but subsists till a deposit is finally accepted by the Court, and consequently, so long as it subsists, all person competent to deposit the dues and costs, may, under the terms of the section, make independent deposits.

*Kamal Krishna Mandal v. Hemendra Krishna Singha* (1) distinguished.

When several persons, each competent to make a deposit under the said section make sufficient and timeous deposits but at different times, the one making the first deposit must on equitable grounds be given preference and his deposit must be accepted. But when the person first applying to make a deposit is prevented by an act of the Court from making his deposit first, his deposit when made, must be deemed to be the first deposit.

Application for Revision by the Petitioner.

The material facts appear from the judgment.

*Messrs. Gopendra Nath Das and Anilendra Lal Kar* for the Petitioner.

*Messrs. Apurba Charan Mukherji and Satyendra Nath Mitra* (for Deputy Registrar) for the Opposite Party.

C. A. V.

The following judgments were delivered :

**Chakravarti, J. :—**This Rule is directed against two successive orders passed on the same day by the learned Third Subordinate Judge of Alipore in a certain rent execution case. By the first he held that a deposit made by opposite party No. 14 was a belated deposit but one made in time as much as an earlier deposit made by the petitioner and that both had to be considered on their merits. By the second he held that the petitioner had

\*Civil Revision Case No. 1535 of 1944, against the orders of the Third Subordinate Judge of Alipore, dated the 2nd August, 1944.

(1) (1939) 71 C. L. J. 413 ; 44 C. W. N. 129.

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no *locus standi* to make deposit in the execution case concerned and the deposit made by opposite party No. 14 who had such *locus standi* must be accepted. The petitioner complains that both these orders were illegal and without jurisdiction.

The facts of the case are as follows. Opposite parties Nos. 1 to 12 hold a permanent tenure under opposite party No. 13 in respect of which the latter obtained, on the 24th of June, 1943, a rent decree for Rs 4829 and 11 annas. On the 18th January, 1943, opposite parties Nos. 2 to 5, who hold an undivided half-share in the tenure, entered into an agreement with the petitioner for a sale of their share to him for a sum of Rs. 8000. A sum of Rs. 1000 was paid as earnest money and the document, which was a registered one, provided that there would be a charge for the earnest money on the property agreed to be conveyed. On the 29th May, 1944, opposite party No. 13 applied for execution of the rent decree, claiming to recover a sum of Rs 4329-11as. a sum of Rs. 500 having been realised by a previous execution. Thereupon the Court ordered the issue of a combined order of attachment and sale proclamation, fixing the 12th July, 1944, as the date of sale. On the 4th July, opposite party No. 14, Kamal Prava, who claimed to be an under-tenure-holder, applied for permission to deposit the decretal dues and costs under the provisions of Section 170 of the Bengal Tenancy Act. The application was directed to be placed for hearing on the 8th July following. On the 5th July, the petitioner made a similar application and this too was directed to be placed for hearing on the 8th July. On that date, the learned Judge heard the parties and passed the following order :

"Heard Pleaders of both the Petitioners. The Petitioner Durga Das Kuthi is permitted to deposit the decretal amount as stated in the sale proclamation at his own risk. As permission is given to the petitioner Durga Das Kuthi, the petition of Kamal Prava is kept filed with the record".

The petitioner made his deposit on the 11th of July.

On the 12th July which, it will be remembered, was the date fixed for the sale, opposite party No. 14 made a fresh application, praying for acceptance from her of the decretal dues with costs and the learned Judge directed the application to be placed for hearing on the 22nd July. The petitioner and the decree-holder made objections to the application. On the 22nd July, opposite party 14 led some evidence in proof of her status, but the petitioner was absent, the learned Judge

passed an order, granting permission to opposite party No. 14 to make a deposit "at her own risk" and adjourning the matter to the 29th July for the hearing of the objections. In pursuance of that order, opposite party No. 14 deposited the requisite amount on the 24th of July. The case could not be taken up on the 29th July and was adjourned till the 2nd August. On that date a preliminary objection was raised on behalf of the petitioner to the effect that the Court, having once granted permission to him to make a deposit, had no authority to grant a similar permission to opposite party No. 14 on a later date. By the first order passed by him, the learned Judge over-ruled the objection and held that the petitioner had only been permitted to make a deposit conditionally, as had been opposite party No. 14, but the question as to whose deposit was good and valid, remained to be considered. Proceeding next to deal with the case on merits, the learned Judge, by a second order passed on the same day, held that the petitioner was not entitled to make a deposit inasmuch as he had no "existing interest in the land of the tenure" and since, in his view, opposite party No. 14 had such an interest, he held that the deposit made by her should be accepted. By a third order, also passed on the same day, he recorded acceptance of the deposit and disposal of the execution case on full satisfaction.

Thereupon, the petitioner obtained the present Rule against the first and the second orders referred to above.

Mr. Das, who appeared for the petitioner, contended that the learned Judge was wrong in holding that in order that a person might be entitled to make a deposit under section 170 of the Bengal Tenancy Act, he must have an existing interest in the land of the tenancy. The section, it was pointed out, only required that his interests must be affected by the sale and the interests of the petitioner, it was contended, were so affected in the present case. Mr. Das contended in the second place that if the petitioner was competent to deposit decretal dues and costs, as in law he was, then after he had been permitted to make the deposit and had made it, there was no longer any subsisting order for sale, against which any other person could make a subsequent deposit. Besides, the order passed on the 8th of July, amounted, so it was argued, to a dismissal of the application of opposite party No. 14. Accordingly it was contended that the learned Judge erred in permitting opposite party No. 14 to make a deposit by a

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subsequent order and in accepting her deposit in preference to the petitioner's he erred further.

Mr. Das also pointed out that the sale was due to take place on the 12th of July. The petitioner made his deposit on the 11th of July, but opposite party No. 14 did not make her till the 24th. On these facts it was argued that it was by the petitioner's deposit that the sale was avoided and it was he who was entitled to the statutory privileges.

Mr. Mukherjee who appeared for opposite party No. 14 did not challenge the contention of Mr. Das that the interests of the petitioner were affected by the sale, but contended that the question did not require decision. He submitted that assuming the petitioner and opposite party No. 14 were both competent to make a deposit, the latter, who had applied earlier was entitled to preference as between the two. It was argued that no final order was passed on the 8th of July when the petitioner was only permitted to make a deposit 'at his own risk' and that the order for sale was alive till the end of August when only one of the deposits was finally accepted. Accordingly it was contended that the learned Judge had committed no error either in permitting opposite party No. 14 to make a deposit by his order of the 22nd of July or finally accepting the deposit made by her.

It seems to me that the question whether the interests of the petitioner were affected by the sale is by no means irrelevant. If they were not affected, the petitioner was not competent to make a deposit at all and if he was not, there would be no question to be decided between him and opposite party No. 14, about whose competence no contention was raised either before us or in the Court below. Mr. Mukherjee, however, was prepared to proceed on the footing that the petitioner was competent to make a deposit and in view of that concession, it is not necessary for us to consider the reasons given by the learned Judge for his finding against the petitioner. But I may add that if a decision was asked for, I would be prepared to hold that the learned Judge was clearly wrong and the petitioner was undoubtedly a person whose interests would be affected by the sale.

It will appear from what has been stated above that the only question calling for our decision is the question raised by the second contention of Mr. Das. That question is whether, assuming the petitioner and opposite party No. 14 were both competent to make a deposit, the learned Judge was justified in the circumstances of the case in permitting a deposit to be made by opposite

party No. 14 and in finally accepting it. Mr. Das contended that he was not justified, first because by his order dated the 8th of July, he had already dismissed the application of opposite party No. 14 and, secondly, because as soon as a deposit was made by the petitioner on the 11th of July, the order for sale was gone and with it disappeared the occasion for anybody making any further deposit.

I feel bound to say that the situation which one finds in this case was created entirely by the inappropriate and ill-expressed order which the learned Judge passed on the 8th of July. On that date he had before him two applicants for permission to make a deposit, and he decided the claim of neither. Yet, he permitted one of them, who had made his application later, to make a deposit, while he directed the application of the other, which had been made earlier, to be "kept filed with the record", whatever that might mean. If his intention was to permit both the applicants to make deposits conditionally, subject to their rights being decided thereafter, as he subsequently declared it to have been, one does not see why he could not pass a straightforward order to that effect, granting permission to both the applicants at the same time and on the same terms. Instead of doing so, he discriminated between the two applicants. And worse than that, he gave as his reason for his direction regarding the application of opposite party No. 14 the fact that he was permitting the petitioner to make a deposit—a circumstance which lends some countenance to the argument of Mr. Das that the learned Judge really rejected the other application.

But however unsatisfactory the order may have been, I am unable to hold that by it the application of opposite party No. 14 was dismissed. The terms of the order have been set out above and they do not show that the learned Judge was disposing of the application. They rather show that he was simply putting it away. There is the further circumstance that the petitioner was permitted to make a deposit, not finally but "at his own risk"; and the risk contemplated by that language may well have been not merely the risk of a finding that the petitioner did not possess the requisite status or that his deposit was insufficient, but also the pendency of the rival application by opposite party No. 14 which might ultimately succeed. Considering the order as a whole, I am of opinion that its effect was not to dismiss the application of opposite party No. 14. The first argument advanced by Mr. Das in support of his contention therefore fails.

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As regards the second argument of Mr. Das, there is a case decided under the Revenue Sales Act to which he did not refer, but which would seem, at first sight, to support his contention. Section 14 of the Revenue Sales Act provides that if, on a defaulting share, held on a separate account, being offered for sale, no bid sufficient to meet the arrears be forthcoming, "the Collector... shall stop the sale and declare that the entire estate will be put up to sale for arrears of revenue at a future date, unless the other recorded sharer or sharers, or one or more of them, shall within ten days purchase the share in arrear by paying the Government the whole arrear due from such share". With reference to this section, it was held by Mukherjea and Roxburgh JJ. in the case of *Kamal Krishna Mandal v. Hemendra Krishna Singha* (1) that if several of the non-defaulter co-sharers made deposits of the arrears at different times, but all within the statutory ten days, there would be an effective purchase only by the first of them and the rest would acquire nothing. The reason given was that the declaration by the Collector was in the nature of an offer and as soon as the first deposit was made, there would be an acceptance of the offer and a completed sale, so that there would be nothing left to be sold to the subsequent depositors or for them to buy. The argument advanced by Mr. Das was similar. It was contended by him that as soon as a sufficient deposit by a competent person was made under section 170 of the Bengal Tenancy Act, the order for sale would cease to exist and the depositor would become a statutory mortgagee under the provisions of section 171. There would be nothing left with respect to which anybody could thereafter be permitted to make a deposit or could make a deposit.

I do not think that the principle laid down in the case above referred to would apply in a case of several deposits made under section 170 of the Bengal Tenancy Act. It is true that the subsistence of an order for sale is a condition precedent to an effective deposit; but there is no offer contained in section 170, like the one contained in section 14 of the Revenue Sales Act, and it seems to me that the order for sale cannot and does not disappear simply by reason of the fact that some one makes a deposit. When the holder of a decree for rent applied for its execution by sale of the tenure or holding, the Court, if admits the application, must "order execution of the decree according to the nature of the application" under Order 21, rule 17 of the Civil Procedure

(1) (1939) 71 C. L. J. 415; 44 C. W. N. 129.

Code. In other words, it must make an order for sale. The provision next to be considered is section 163(1) of the Bengal Tenancy Act. That section lays down that if the Court orders execution of the decree as applied for under Order 21, rule 17, it shall issue a combined order of attachment and proclamation. It is when making this order and issuing the sale proclamation that the court fixes a date for sale, but this fixing a date for the sale is something different from and subsequent to the order for sale made under Order 21, rule 17. Coming next to section 170, that section, to quote for sale in execution of a decree has been made, the tenure or holding shall not be released from attachment, unless the amount of the decree, together with costs, is paid into court and the section goes on to say that the judgment-debtor or any person whose interests are affected by the sale, may pay money thereunder. It seems to me that when section 170 speaks of an order for sale, it refers to not the order under section 163(1) fixing the date for the sale, but the initial order for execution of the decree by sale, made under Order 21, rule 17 of the Civil Procedure Code. That order is not extinguished by simply a deposit being made. It is true that when the decretal dues, together with costs, are put in, the advertised sale does not take place, as it did not in the present case; but if the deposit be found to be insufficient or the depositor not to be a competent person, another sale may yet be held and that in pursuance of the original order for sale, whether with or without a fresh sale proclamation. Till a deposit is accepted and the execution case dismissed on full satisfaction, the order for sale remains, although the particular sale advertised may fall through.

My view therefore is that the order for sale referred to in section 170 of the Bengal Tenancy Act, by which is meant the initial order for execution of the decree by sale made under Order 21, rule 17 of the Civil Procedure Code, is not extinguished automatically as soon as a deposit, purporting to be of the decretal dues and costs, is made, but subsists till a deposit is finally accepted by the Court; and consequently, so long as it subsists, all persons competent to deposit the decretal dues and costs, may, under the terms of the section, make independent deposits.

It follows that when opposite party No. 14 was allowed on the 22nd of July to make a deposit, she was rightly so allowed. The second argument advanced by Mr. Das also fails.

But when several persons make valid deposits, each on his own account, by what principle is the question of priority as between

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them to be decided? The statute contains no provisions bearing upon the point and, in my view, equitable consideration must be applied. It is elementary that equities rank in order of time. When, therefore, several persons, each competent to make a deposit, make sufficient and timeous deposits that at different times, the one making the first deposit must, on equitable grounds, be given preference and his deposit must be accepted.

In the present case, the actual first deposit was made by the petitioner and on the principle above stated, he would be entitled, in the absence of other circumstances, to have his deposit accepted. But there is another principle, viz., nobody must be prejudiced by an act of the Court, and in my view the circumstances of the present case attract its operation. Although the petitioner made the first deposit in fact, the opposite party No. 14 applied for permission to deposit before him and had her application been allowed then or even simultaneously with the application of the petitioner, she might easily have made her deposit first. There was no reason whatever why the Court should have postponed the consideration of her earlier application till long after it had allowed the later application of the petitioner and till after the petitioner had made his deposit and thereby prevented her from making her deposit first. She was ready with the money on the 4th of July and also on the 12th and it was solely by the act of the court that she was prevented from making her deposit earlier than the 24th.

To the principle of equity above stated, I would add a corollary, viz., when the person first applying to make a deposit is prevented by an act of the court from making his deposit, first, his deposit, when made, must be deemed to be the first deposit. Accordingly, the deposit made by opposite party No. 14 in the present case must be deemed to be first deposit and in accepting it in preference to the petitioner's, the learned Judge acted rightly, although the reasons on which he acted are wrong.

In the result, the Rule is discharged, but in the circumstances of the case I would make no order as to costs.

Akram, J. :—I agree.

A. T. M.

*Rule discharged.*

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**Abatement of rent—Bengal Tenancy Act (VIII of 1885), section 52 clause 1(b)—Tenant, holder of a tenure by virtue of a *mourashi* *mokurari* lease—Landlord stipulating to maintain embankment on boundary of demised land—Embankment later on washed away by river and new embankment erected on part of demised land—Diminution in area caused thereby—Tenant, whether entitled to abatement of rent, land not being in a permanent settled area—Right to claim abatement of rent, when can be taken away—Section 179 if in the nature of exception—Onus of proving element bringing case within section 179—Recital in lease that parent estate *nishar*.**

The plaintiff respondent was holder of a tenure under the defendant appellant by virtue of a *mourashi mokurari* lease. It was agreed between the landlord and tenant that the tenant would not be entitled to claim a reduction of rent for any reason whatsoever. The landlord also stipulated that he would maintain an embankment on the boundary on one side of the demised land beyond which was a river. The embankment was later washed away and the landlord erected a new embankment which of necessity had to be constructed upon a strip of demised land causing a diminution in the area. The landlord failed to prove that the land was in a permanently settled area. The plaintiff instituted a suit for abatement of rent owing to deficiency in the area of his tenure:

*Held*, that the plaintiff was entitled to claim reduction of rent under section 52 clause 1(b) of the Bengal Tenancy Act in respect of diminution in the area.

The right given to a tenure-holder to apply for an abatement of rent on account of deficiency in the area of his tenure cannot be taken away by any contract except one which answers the description given in section 179 of the Bengal Tenancy Act. Section 179 of the Bengal Tenancy Act embodies a provision in the nature of an exception. The onus to establish every element necessary to constitute the exception is on the landlord.

A recital in the *mokurari* lease that the estate had been redeemed from rent or revenue is not sufficient to show that it had been permanently settled. *Sarat Chandra Mitra v. Saradindu Mukherjee*

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| When a statute directs a document to be filed in an office, the direction involves no formal or technical procedure. All that is required is that                                                                                                                                                                                                                                                                                                                                                                                                            |       |

**Certificate—(Contd.):**

the document should be preserved in the office in such conditions that it can be produced when required.

When the certificate stated in the face of it to have been filed, particulars of it were registered under rule 79 schedule II of the Bengal Public Demands Recovery Act, 1913 and it was produced by the office:

*Held*, that it sufficiently proved that the certificate officer caused the certificate to be filed in his office and it was not necessary to have recourse to the presumption arising under section 114 Illustration E of the Indian Evidence Act.

The Income-tax Officer, purporting to act under the power conferred by section 45 sub-section (2) of Income Tax Act, 1922, addressed to the Collector a certificate certifying that the sum of..... due from the debtor on account of income-tax, super-tax and penalty was in arrear, and requesting the Collector to recover the amount as if it were an arrear of land revenue:

*Held*, that the effect of this certificate was to make the claim against the debtor a public demand within the meaning of the Bengal Public Demands Recovery Act, 1913, by virtue of section 3, sub-section (6) of the Act and clause (3) of schedule I.

The Certificate Officer signed a certificate stated to be under sections 4 and 6 of the Public Demands Recovery Act, 1913:

*Held*, that as the money was payable to the Collector and accordingly the certificate was issued under section 4 of the Public Demands Recovery Act, 1913 and not under section 6, no requisition under section 5 was required.

If the monies were payable to the Collector, the name of the certificate officer should be the Secretary of State for India:

*Held*, that the addition of words "on behalf of Income-tax Officer Howrah" after "Secretary of State for India" did not in any way alter or qualify the name of the certificate-holder which was given as the Secretary of State. The words only indicated the nature of the demand for which the certificate was held, but the inclusion of the words had no effect whatever on the validity of the certificate.

Although income-tax may be described as due for a certain year, it is not in law so due. It is calculated and assessed by reference to the income of the assessee for a given year, but it is due when demand is made under sections 29 and 45. It then becomes a debt due to the Crown, but not for any particular period. *Doorga Prasad Chamarla v. Secretary of State for India* ... 13

....., if filed in office—Certificate stated in the face of it to have been filed, particulars of it registered under rule 79 schedule II of the Bengal Public Demands Recovery Act, 1913 and was produced by the officer; *see* Certificate ... 13

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**Certificate—(Contd.):**

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| Thirty-three persons made an application for the appointment of Common                    |       |
| Manager of seventeen items of property comprised in an estate. Another                    |       |
| person was subsequently added as a co-applicant. There were two                           |       |
| opposite parties to the application. Of those thirty six persons only                     |       |
| the first twenty-nine out of the applicants and the two opposite parties                  |       |
| had shares in all the seventeen items. In respect of one item of property                 |       |
| only one applicant (No. 34) had an interest and there was no co-owner.                    |       |
| There was no indication in the application that all the parties were not                  |       |
| co-owners of all the seventeen items. The applicants having failed                        |       |
| to appoint a Common Manager within the time allowed the District                          |       |
| Judge appointed a Common Manager. Two persons, 5 annas co-sharers,                        |       |
| mortgaged 4 annas share in two items of property to another person.                       |       |
| The mortgagee sued on the mortgage, obtained decree and proceeded                         |       |

**Common Manager—(Contd.):**

to execute the decree. The Common Manager was made party in the execution proceedings without the sanction of the District Judge. The mortgagee-decree-holder purchased the mortgaged share and obtained symbolical possession. He brought a suit with a view to managing the share in Khas after turning out the Common Manager. The questions that arose were (a) whether the order of appointment of Common Manager is a nullity; and (b) what is the effect of delivery of possession to the plaintiff by the Court in the execution proceedings in which the Common Manager had been made a party:

*Held*, (1) that the appointment of the Common Manager was illegal and the plaintiff was entitled to recover possession from the Common Manager and manage his share himself.

(2) The order of appointment of a Common Manager if made on one application by one order, where several ought to have been made according to the groupings, would be regarded as not *merely* but *substantially* irregular, and even illegal.

There is no difference in the law on the point before the amendment of 1928 and after.

*Obiter*: The appointment of the same man in respect of several groups of estate but by separate order in separate proceedings, though it may not be prudent, would not be illegal, the selection of the man for the office of common manager being a matter of discretion for the District Judge.

(3) In case of non-compliance with the essentials of a procedure as regards notice etc. relating to the appointment of common manager, a suit would lie. *Gopinath Biswas v. Maulvi Md. Nurul Absar* ...

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\_\_\_\_\_, appointment of—Bengal Tenancy Act, sections 93, 94, 95, 98, 99—Application for appointment of common manager by several persons—All applicants and opposite parties not co-owners of all the items of property involved, though application contained contrary indication—Failure to appoint common manager within time fixed by District Judge—Appointment by District Judges, if valid; *see* Common Manager ...

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\_\_\_\_\_, appointment of, validity of—Application for appointment by several persons, who are not co-owners of all the items of property involved, though application contained contrary indication—Appointment of common manager by District Judges on failure by parties to appoint within the time fixed; *see* Common Manager ...

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\_\_\_\_\_, order of appointment of, made on one application by one order, if legal—Application for appointment by several persons who are not co-owners of all items of property involved, though application contained contrary indication; *see* Common Manager ...

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**Constitution Act**, section 93, proclamation under, if applicable to section 59(2) or clause 10(3) of the Ordinance III of 1914; *see* *Detinue* ...

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\_\_\_\_\_, 1935, section 240—"Except as expressly provided by this

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\_\_\_\_\_*Contract for sale of goods—"Delivery", what is—Possession given to carrier, if and when, is 'delivery' to buyer—Sale of Goods Act (III of 1930), sections 2(2), 23(2), 25 and 39—Order promulgated under Defence of India Act fixing price at a rate lower than contract rate and making it unlawful to sell at higher price, if affects material term of contract and if latter "becomes void"—Contract Act (IX of 1872), section 56—The buyer, if entitled to recover the difference between the contract price which he has paid and the price fixed by Defence of India Act—Contract Act, sections 65 and 72—"Advantage received under the contract" in section 65, meaning and scope of—"Mistake" in section 72, if includes "mistake of law"—Difference in scope between sections 72 and 21 of the Contract Act*

The plaintiff entered into a contract with the defendant for the purchase of certain goods. The goods were loaded on railway wagons on December 27, 1943 by the defendant. In the railway receipt the defendant was the consignee. On January 3, 1944, the railway receipt was endorsed over to the plaintiff and the plaintiff paid the balance of the price. In the meantime on December 16, 1943 a new order was passed under the Defence of India Act fixing the price of the goods at a figure lower than that mentioned in the contract, and the order was made applicable to all contracts in which delivery was to be given on or after January 1, 1944. The plaintiff seeks to recover the difference between the contract price fixed by the Defence of India Act :

*Held*, (I) that the consignee was not the buyer but the seller and the goods were therefore being "transmitted" to the seller and not to the buyer. In such a case 'delivery to the Railway Company' cannot be deemed to be 'delivery to the buyer' within the meaning of section 39 of the Sale of Goods Act.

(II) that the order passed under the Defence of India Act would affect the contract.

**Contract—(Contd.):**

(III) that the price being an essential term in the contract, the contract as it stood could not be performed without infringing the law and it therefore became void as under section 56 of the Contract Act on the date of the promulgation of the aforesaid order under the Defence of India Act.

(IV) Section 65 of the Contract Act applies only if the advantage is received before the contract ceases to be a contract by becoming void. In this case it was received after and therefore the section does not apply.

(V) section 21 of the Contract Act deals only with mistakes of law which give birth to a contract; it has nothing to do with any other kind of mistake. If therefore a payment made under a mistake of law is not the origin of a contract such payment would be refundable under section 72.

The English common law rule that a payment made under a mistake of law is not recoverable can have no application here, where there is a statute governing the question.

The plaintiff cannot be permitted to split up the payment made in the way he seeks to do and to treat a part only of such payment as being a payment made by mistake refundable under section 72. **Jagdish Prosad Pannalal v. Produce Exchange Corporation Limited** ... 170

—, construction of—Agent and supplier—Commission, when payable; *see* Pleading ... 297

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—, section 233—Agent, though disclosing the name and identity of his principal, but contracts personally; *see* Pleading ... 297

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**Criminal Court, duty of, as to giving decision; see High Court** ... 19

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**Damages—Negligence—Duty, breach of—Res ipsa loquitur—Vis major—Damages, how assessed.**

A duty is cast upon a person who put on his land something which was dangerous if it escaped to the land of another, to keep the thing on his

**Damages—(Contd.):**

own land at his own peril, and, if it escaped, then he was answerable for the consequences, whether the escape was due to negligence or not.

The proprietor of property abutting on a highway is under a positive duty to keep his property from being a cause of danger to the public.

The act of God offers a defence.

The definitions of negligence given by judges bring into prominence the element of a duty which the defendant owes to another person.

That another person is the person who is so closely and directly affected by the acts of the defendant that he ought reasonably to have them in contemplation as being so affected when the defendant was directing his mind to the acts or omissions which are called in question. The essentials of negligence are given by Professor Winfield in his Text-book on the Law of Tort as follows: "Negligence as a tort is a breach of a legal duty to take care which results in damage undesired by the defendant to the plaintiff. Thus its ingredients are: (a) legal duty on the part of A towards B to exercise care in such conduct of A as falls within the scope of duty. (b) Breach of duty, (c) Consequential damage to B."

Where a heavy object is suspended over a high way and it must fall into it unless supported by artificial means which can only be kept in order by the person in possession of the premises such person is bound absolutely to maintain the attachments.

The consideration which may be permitted, in circumstances where they arise, to influence an assessment of damages includes (a) pain and suffering, (b) loss of earnings or loss of a prospect of lucrative employment and (c) a shortened expectation of life provided that life held a positive measure of happiness.

The defendant is the proprietor of a motion picture exhibition establishment. The portion of the building which abuts on the street is one-storied. On the roof of this, about 4 feet from its western edge, overlooking the street, stands a sky sign which is more or less permanent structure consisting of steel frame held firmly in place in an upstanding position by means of masonry and iron attachments. It is 12 feet high by 25 feet wide. On this framework and firmly attached to it in a vertical position there is galvanized iron sheeting, the surface of which, facing westwards towards the street, was intended to carry advertising designs. The galvanized sheeting covers the whole surface of the framework. Banners were displayed from the sky sign. There is in the framework of the sky sign no contrivance by means of which such banners would be held firmly and securely in place. The banners were held against the galvanized sheet by means of cheap coil ropes which were fastened to the four corners of the wooden frame which contained the cloth design and the ropes were then carried over and under the metal frame of the sky sign and knotted to certain angles and iron rods behind. The lower portion of the wooden frame of the banners did not rest on the ground.

**Damages—(Contd.):**

A banner measuring 12 feet in length and 3½ feet in width, within a wooden frame, fell from its position against the sky sign, on the plaintiff, who was passing along the pavement. The wooden frame struck him on the head, he sustained a cut thereon, which was severe.

The defence was that there was no negligence on his or his servant's part and it was the act of God:

*Held*, that the defendant was liable, upon the principle in *Rylands v. Fletcher*. There was negligence on the part of defendant's servants for which he was responsible in law, inasmuch as proper care was not taken to secure the banner in such a way as to prevent it from being blown into the street during monsoon weather. The presumption of want of due care on the part of the defendant or his servants, which the maxim of *res ipsa loquitur* raises against him was not rebutted. The banner fell in a wind which was not above 27 miles per hour in velocity.

Cases on the point reviewed. *Manindra Nath Mukherjee v. Mathuradas Chatterbuj* ... .. 90

—, assessment of—Considerations; *see* Damages ... .. 90

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**Deora land, resumption of, by Government and formed into a temporarily settled estate and settled with the proprietor—Settlement of rent by revenue authorities—Law before and after the passing of The Bengal Tenancy Act as to contractual rights as between proprietor and the intermediate tenure-holder under a lease; *see Ultra vires*** ... .. 178

**Death of plaintiff—Right to sue—Executor or administrator; *see* Substitution** ... .. 130

**Debt Settlement Board, orders of, how to be challenged; *see* Jurisdiction** ... .. 238

**Decree, execution of—Execution of decrees—Section 47 Civil Procedure Code (Act V of 1908)—Sale held and finally confirmed, and purchase by stranger, notwithstanding receipt of notice of stay under section 34 Bengal Agricultural Debtors Act (Act VII B. C.) of 1936, as amended by (Act VIII B. C. of 1940)—Application by judgment-debtor challenging legality of sale, if one under said section 47—Judgment-debtor, if competent to start the proceeding.**

Soon after an application for execution of a rent-decree had been filed, the Executing Court received a notice under section 34 of the Bengal Agricultural Debtors Act directing a stay of all further proceedings in execution, but the notice somehow escaped attention and so the proceedings were continued, the sale duly held and confirmed, the purchase having been made by stranger and the execution case disposed of on full satisfaction. The present proceeding was then started by the judgment-debtor by an application under section 47 of the Code of Civil Procedure to set aside the sale on the ground that it was null and void. The questions that arose were, whether such an application could be

**Decree—(Contd.):**

one under section 47 of the Code of Civil Procedure and whether the present proceeding lay after the sale had been confirmed by an order of the Court and the execution case disposed of on full satisfaction:

*Held*, (1) That the question was one between the judgment-debtor and the decree-holder and the fact that the purchaser though not a party to the suit is interested in the result does not operate as a bar to the application of section 47 of the Code of Civil Procedure.

(2) That the judgment-debtor was not competent to resist the purchaser after the sale was confirmed, if he was aware of the proceeding but did not raise objection to the sale.

Case law reviewed.

No decision was given in the High Court as to the validity of sale after receipt of notice by the execution Court under section 34 of the Bengal Agricultural Debtors Act. **Sarat Chandra Gayan v. The Port Canning and Land Improvement Company, Limited** ...

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—, *execution of—Bengal Tenancy Act (VIII of 1885 as amended), section 168A, if repugnant to section 51 of the Code of Civil Procedure (Act V of 1908) and if void under section 107(1) of the Government of India Act, 1935—Proviso to section 17(1) of the Patni Regulation (VIII of 1819), if in conflict with section 168A of the Bengal Tenancy Act—Section 168A, if applicable to patni tenure.*

Section 168A of the Bengal Tenancy Act is a valid piece of legislation quite within the competence of the provincial legislature under items Nos. 2 and 21 of the provincial list. Item No. 21 of List II is wide enough to cover all matters of the remedial or adjective law in relation to land, and land tenures, arising out of relationship of landlord and tenant, and includes provisions for collection and realisation of rent by the landlord from the tenant.

A case of repugnancy does not arise if no aspect of any provincial legislation encroaches upon any field other than that of the provincial legislature.

It is not enough to say that section 168A of the Bengal Tenancy Act has introduced a provision differing from that contained in section 51 of the Code of Civil Procedure. The rival existing Indian law is not section 51 of the Code of Civil Procedure, but the provision of that section as incorporated into the Bengal Tenancy Act, but as that provision, so far as it deals with the question of procedure in a suit or proceeding between the landlord and the tenant comes under items 2 and 21 of the provincial list, there is no existing Indian law on any matter enumerated in the concurrent list with which section 163A of the Bengal Tenancy Act can be said to have come into conflict.

Also provisions of section 168A of the Bengal Tenancy Act are not repugnant to section 51 of the Code of Civil Procedure, the repugnancy is avoided by the express words of section 4 of the Code and consequently it is not void under section 107(1) of the Government of India Act, 1935.



**Decree—(Contd.):**

Section 168A of the Bengal Tenancy Act applies to patni tenure.

Section 168A of the Bengal Tenancy Act does not in any way affect the right of institution of a suit or obtaining a decree. The only restriction it imposes is upon the mode of execution of the decree and as no particular mode of execution is prescribed in the Patni Regulation itself it cannot be said that section 168A is in conflict with the proviso to section 17 of the Patni Regulation. **Maharajah Hiral Uday Chand Mahatab Bahadur of Burdwan v. Ajit Kumar Roy** ...

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—, Rule 81 sub-rule (4), prosecution under—Form of sanction under clause 16 of the Drugs Control Order, 1943—**Constitution Act, 1935, sections 49, 59; see Sanction** ...

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**Deposit—Bengal Tenancy Act (VIII of 1885), section 170—Order for sale, when comes to an end—Several under-tenure-holders making valid and timeous deposits—Preference—Equitable principle.**

The order for sale referred to in sub-section (2) of section 170 of the Bengal Tenancy Act, by which is meant the initial order for execution of the decree by sale made under order 21 rule 17 of the Code of Civil Procedure, is not extinguished automatically as soon as a deposit, purporting to be of the decretal dues and costs is made, but subsists till

**Deposit—(Contd.):**

a deposit is finally accepted by the Court, and consequently, so long as it subsists, all person competent to deposit, the dues and costs, may, under the terms of the section, make independent deposits.

When several persons, each competent to make a deposit under the said section make sufficient and timeous deposit but at different times, the one making the first deposit must on equitable grounds be given preference and his deposit must be accepted. But when the person first applying to make a deposit is prevented by an act of the Court from making his deposit first, his deposit when made, must be deemed to be the first deposit. *Durga Das Kuthi v. Ram Dayal Samaddar* ...

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**Detention** based on pre-existing grounds—Earlier order of detention defective merely on formal grounds; *see* Detinue ...

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—, order of, can be passed against a person who is already under detention; *see* Detinue ...

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I

**Detinue—Detention of—Criminal Procedure Code (Act V of 1898), section 491, application under—Ordinance No. III of 1944, if ultra vires the Governor-General—Legislation relating to prosecution of war—Ordinance No. III of 1944, clause (11), if valid—Acting prejudicially to the maintenance of public order and the efficient prosecution of war—Order, proof of—Constitution Act, 1935, sections 59(2), 93—Ordinance No. III of 1944, section 11 clause (a)—Burden of proof—Proof to the contrary—Challenging the factum or bona fides of the order—Mala fides—Cancellation of previous order—Earlier order of detention defective on formal grounds—Proper order of detention on pre-existing grounds—Order of detention, if can be made against a person who is already under detention—Analogy of civil proceedings to Habeas Corpus proceedings—Validating order.**

Ordinance No. III of 1944 is not *ultra vires* the Governor-General as to authorising detention on the ground that the detinue is likely to act in a manner prejudicial to the efficient prosecution of the war.

The legislation relating to the prosecution of war is within the subject specified in Entry No. 1 in List I. The reference to "the efficient prosecution of the war" in Ordinance No. III of 1944 as well as in the order of detention is to be understood in the light of the circumstances in which the Ordinance came to be passed.

Clause 11 of the Ordinance No. III of 1944 is not invalid in so far as it prohibits certain matters being adduced in evidence during the currency of the Ordinance.

It is open to the detinue to show that the order of detention on the ground that it was necessary so to do with a view to preventing him from acting in a manner prejudicial to the maintenance of public order and the efficient prosecution of the war was not in fact made by the Governor

**Detinue—(Contd.):**

or that it was a fraudulent exercise of the power. The burden of substantiating these pleas lies on the detinue.

As regards proof of the orders, there is nothing in the proclamation under section 93 of the Constitution Act to exclude the application of section 59(2) of the said Act or clause 10(3) of the Ordinance.

The mere fact that the detinue challenges the factum or the *bona fides* of the order or the fact that the Officers of the Government must naturally be in possession of information on the subject is not "proof to the contrary" so as to make it incumbent on the Government to adduce evidence in support of the order.

The fact of cancellation of the order of 19th March, 1942 by the order of 3rd July, 1944 and the passing of a fresh order of detention on the 3rd July, 1944 does not show *malæ fides*.

Where the earlier order of detention is held defective merely on formal grounds there is nothing to preclude a proper order of detention being based on the pre-existing grounds themselves, especially in cases in which the sufficiency of the grounds is not examinable by the Courts.

An order of detention can be passed against a person who is already under detention.

The analogy of civil proceedings in which the rights of parties have ordinarily to be ascertained as on the date of the institution of the proceedings cannot be invoked in proceedings in the nature of Habeas Corpus.

If at any time before the Court directs the release of the detainees, a valid order directing his detention is produced, the Court cannot direct his release merely on the ground that at some prior stage there was no valid cause for detention. The question is not whether the later order validates the earlier detention but whether in the face of the later valid order the Court can direct the release of the petitioner. **Basanta Chandra Ghose v. The King-Emperor** ... .. I

—, challenging the factum or the *bona fides* of the order or the fact that the officers of the Government must naturally be in possession of information on the subject—"Proof to the Contrary"; *see* Detinue ... .. I

—, if can show that the order of the detention with a view to prevent him from acting in a manner prejudicial to the maintenance of public order and the efficient prosecution of the war was a fraudulent exercise of the power; *see* Detinue ... .. I

—, if can show that the order of detention with a view to prevent him from acting in a manner prejudicial to the maintenance of public order and the efficient prosecution of the war was not in fact made by the Governor; *see* Detinue ... .. I

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**Ejectment—Lease, expiry of—Trespasser—Sub-lease by lessee—Liability to deliver vacant possession—Estoppel, waiver, acquiescence—Evidence to show that before lease possession was not vacant—Ignorance as to legal liability—Prayer for damages with claim for mesne profits—Receiver, position of—Prayer for damages during the possession of Receiver.**

A Receiver does not hold for the benefit only of the party at whose instance he is appointed. The Receiver is an officer of the Court, and though he holds for the ultimate benefit of the parties to the suit, the property, when it comes into his possession, becomes "in custodia legis":

An act which may amount to waiver or acquiescence by one of the trustees when performed in his individual capacity cannot, when done by him as trustee, bind the trust estate unless it had the concurrence of his co-trustee.

Ordinarily ignorance in regard to one's legal liability or the fact that one acted from motives of prudence and foresight cannot afford a defence.

By an indenture of lease dated May 6, 1932, certain premises in Camac Street, [Calcutta] were demised by trustees, plaintiff and defendant No. 2 for a period of 7 years to defendant No. 1: The lease had retrospective effect from 1st September, 1931. On the expiry of the lease, the trustees demanded possession of the premises, but defendant No. 1 could not give vacant possession as there were sub-tenants on the land. On November 7, 1938, the present suit was instituted and on 10th November, 1938 a Receiver appointed at the instance of the plaintiff, took possession.

The case for the plaintiff was that the first defendant was liable to deliver vacant possession of the premises when the lease expired; that his offer to give what is called symbolic possession by asking the sub-tenants to attorn to the lessors was not in law a sufficient discharge of this liability; that his profession of willingness to surrender possession was belied by his conduct in continuing to collect rents from the sub-tenants after the 31st August, 1938; that by collecting rents in this way, the first defendant committed overt acts of trespass, that the plaintiff was compelled to ask for the appointment of a Receiver in order to prevent the first defendant from prolonging his trespass and from

**Ejectment—(Contd.):**

continuing to intercept the rents payable by the sub-tenants; that the first defendant was liable to compensate the lessor for any loss of profit to them which arose out of defendant No. 1's conduct between the 31st August, 1938 and the 10th November, 1938.

The plaintiff sued for recovery of possession of the said premises, for mesne profits and damages against the first defendant for the period commencing on 1st September, 1938, that is, upon expiry of the lease until the possession is decreed and the Receiver discharged:

*Held*, that the defendant No. 1 could not be allowed to call evidence to show that some of the sub-tenants who were in occupation on 1st September, 1938, were there before 1st September, 1931.

That the plaintiff along with defendant No. 2 was entitled to recover mesne profits from defendant No. 1, up to 9th November, 1938, who should be considered as trespasser from 1st September, 1938 to 9th November, 1938, and damages thereafter, the measure of both of which is the rent which the latter was paying under the lease.

The trustees' powers being joint, no act performed by one trustee in respect to it, without the consent of the other, could bind the estate.

That the right of the trustee lessors to recover vacant possession was not renounced by the willingness of only one of them to take delivery of possession in some other mode. The liability of the first defendant to deliver vacant possession remained and it had never been discharged and on the 1st September, 1938, the first defendant became trespasser.

An invasion of lessors' right to recover vacant possession was a wrong to which the doctrine *Actus non, facit reum, nisi mens sit rea*\* cannot apply.

That the ousting of defendant No. 1 from possession, even if it operated to terminate his trespass, did not have the effect of passing possession to the plaintiff inasmuch as the Receiver could in no sense be regarded as the plaintiff's agent.

Order 20 Rule 12 of the Code of Civil Procedure does not prohibit additional reliefs which a plaintiff who seeks to recover possession of immovable property may wish to ask for.

Order 2 Rule 4 is to be read with Order 2 Rule 3 of the Code of Civil Procedure.

The compensation for loss which the plaintiff claimed, in respect of the period covered by the Receiver's possession, might be caught up under clause (b) of Order 2 Rule 4 of the Code of Civil Procedure, as it arose out of the breach of the contract to surrender vacant possession. In any event, it is within the intention of clause (c) of Rule 4 of Order 2, "claims in which the relief sought is based on the same cause of action."

\*Meaning—The act itself does not make a man guilty, unless his intention were so. The intent and act must both concur to constitute the crime—DEAIL.

**Ejectment—(Contd.) :**

A claim for mesne profits is virtually a claim for damages.

That the plaintiff was entitled to mesne profits from 1st September to 9th November, 1938 for wrongful possession of defendant No 1 and for damages after 9th November, 1938 for the loss occasioned by the costs, charges and expenses of the Receiver.

That a prayer for damages for the period which followed the Receiver's appointment could be joined with that for mesne profits for the period which preceded the appointment, though the former did not arise until after the suit had been filed. *Copaldas Khettry v. Phulchand Pursottamdas* ... .. 259

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**Evidence Act, section 114 Illustration (E)—Presumption—Certificate, if filed in office—Certificate stated in the face of it to have been filed, particulars of it registered under rule 79 schedule II of the Bengal Public Demands Recovery Act, 1913 and was produced by the office ; see Certificate** ... 13

**Execution—Bengal Tenancy Act (Act VIII of 1885), section 168(1) (a) Proviso—Decree for rent of a *patni* tenure obtained by landlord for 1331-1334 B. S.—Execution—No realisation—*Patni* put up for sale in execution of a certificate case started by landlord for rent of subsequent period and purchased by landlord—Fresh execution case started on the decree obtained by landlord for 1331-1334 B. S. for attachment and sale of certain property of judgment-debtor other than the tenure in arrear—Execution, if can proceed—"Application" referred to in proviso, meaning of—Proviso, when applicable.**

The application for execution mentioned in the proviso under section 168A (1) (a) does not refer to the first application for execution of the decree but to the particular application for attachment and sale of the properties of the judgment-debtor other than the tenure in arrear which but for the proviso would be barred under section 168A (1) (a) of the Bengal Tenancy Act.

To attract the proviso to section 168A (1) (a) of the Bengal Tenancy Act it is not necessary to show that the tenancy expired after the section 168A came into force.

The proviso to section 168A (1) (a) of the Bengal Tenancy Act will have no application where the landlord had purchased the tenure in execution of the very same decree for the balance due under which the subsequent execution case was started. In such a case

**Execution—(Contd.):**

the landlord cannot proceed against the other properties of the judgment-debtor, *i. e.*, to say, properties other than the tenure.

Where however a landlord having purchased the tenure in execution of a later rent decree proceeds against judgment-debtor's other properties in execution of an earlier rent decree the landlord can avail himself of the proviso and if there is merger the execution will proceed. *Sree Sree Iswar Radha Ballav Jew Thakur v. Mahima Ranjan Roy*

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**Execution sale—Setting aside of—Civil Procedure Code (Act V of 1908), Order 21, Rules 66, 68, 90—Waiver of fresh proclamation of sale by the judgment-debtor, efficacy of—Conduct of decree-holder, when amounts to fraud on the Court—Decree-holder purchaser—Duty of Court under Order 21 Rule 66—Conduct of judgment-debtor, dilatory and unsatisfactory.**

The efficacy of a plea of waiver of fresh proclamation for sale by the judgment-debtor depends on the ability of the decree-holder to prove that the judgment-debtor knew the true facts from which an intention on his part to waive his right to object to a misstatement in the proclamation can be inferred.

If the decree-holder knew the true facts, if he purchased at what he knew was too low a figure based on an upset price accepted by the Court owing to his own initial misrepresentation and subsequent suppression of material facts, his conduct would amount to fraud on the Court. The Court could not have allowed the decree-holder purchasing at a Court sale to take advantage of his own fraud, whatever the conduct of the judgment-debtor might have been.

Order 21 Rule 66 of the Code of Civil Procedure imposes upon the Court the duty of causing a proclamation of the intended sale to be made and requires the proclamation to be drawn up after notice to the decree-holder and judgment-debtor and such proclamation must specify, as fairly and accurately as possible, amongst other things, any encumbrance to which the property is liable. In most cases no doubt the Court has no means of checking the information supplied by the parties, but the Court ought,

**Execution sale—(Contd.):**

as far as practicable, to check the information supplied by the parties and the Court ought to avail itself of such material. The Court is not intended to act blindly on information supplied by the parties.

The sale having taken place at a serious undervalue occasioned by failure on the part of the Court and of the decree-holder, to carry out their obligations under order 21 rule 66 of the Code of Civil Procedure and undoubtedly the judgment-debtor having sustained substantial injury thereby, the case falls within the language of order 21 rule 90 of the Code of Civil Procedure and however dilatory and unsatisfactory the conduct of the judgment-debtor may have been, he has on the facts found debarred himself of the right to have the sale set aside.

**Marudanayagam Pillai v. Manickavasakam Chettiar**

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High Court—Power to quash police investigation before charge is preferred—Receipt and recording of an information report, if condition precedent to the setting in motion of a criminal investigation—Police, if can of its own motion investigate into truth of matters alleged—Object of first information report—Findings in civil proceeding, if binding on subsequent prosecution on the same or similar allegation—Judiciary, if can interfere with police in matters within their province—Functions of police and judiciary—Criminal Procedure Code (Act V of 1898), section 501A.

The High Court has no power under section 501A of the Code of Criminal Procedure to quash police investigation into cognisable crime before a charge is preferred before the Court and not until then. The Court in its inherent jurisdiction under section 501A has power to make such orders as may be necessary to prevent abuse of the process of the Court or otherwise secure the ends of justice. It has no power to interfere with the duties of the police.



**High Court—(Contd.) :**

The receipt and recording of an information report is not a condition precedent to the setting in motion of a criminal investigation. The police, if in possession through their own knowledge or by means of credible though informal intelligence which generally leads them to the belief that a cognisable offence has been committed, should of their own motion undertake an investigation into the truth of the matters alleged (see section 157 of the Code of Criminal Procedure).

The object of the first information report is to obtain early information of alleged criminal activity to record the circumstances before there is time for them to be forgotten or embellished.

The findings in a civil proceeding are not binding in a subsequent prosecution founded upon the same or similar allegations.

It is the duty of the Criminal Court when a prosecution for a crime takes place before it to form its own opinion and not to reach its conclusion by reference to any previous decision which is not binding upon it.

It is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry.

In India, there is a statutory right on the part of the police to investigate the circumstances of an alleged cognisable crime without requiring any authority from the judicial authorities and it would not interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court.

The functions of the judiciary and the police are complementary, not overlapping, and the combination of individual liberty with a due observance of law and order is only to be obtained by having each to exercise its own function, always of course subject to the right of the Courts to intervene in an appropriate case when moved under section 491 of the Criminal Procedure Code to give directions in the nature of *habeas corpus*.

Section 561 of the Code of Criminal Procedure gives no new powers; it only provides that those which the Court already inherently possesses shall be preserved and is inserted lest it should be considered that the only powers possessed by the Court are those expressly conferred by the Criminal Procedure Code and that no inherent power had survived the passing of the Act. **The King-Emperor v. Khwaja Nazir Ahmad** ... .. 19

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Under Rule 75A of the Defence of India Rules, the obligation to form an opinion regarding certain specified matters is in the nature of a condition or qualification or limitation annexed to the power of making the specified orders and circumscribes the scope and limit of that power. It is an integral part of the power itself. So, the delegation of the power carries with it its own limitation as part of itself and the delegatee must perform the one composite act, namely, the formation of the opinion and the making of the order, which is a valid exercise of the power.

No *certiorari* would lie, because the Additional Land Acquisition Collector, in acting under Rule 75A of the Defence of India Rules was not a Court.

The impugned order being a ministerial or executive act, *mandamus* does lie.

Where such power as is mentioned in Rule 75A is given to any particular authority and the exercise of the power is only dependent on the opinion of that authority the formation of the opinion of that authority is clearly

**Injunction—(Contd.) :**

a matter for executive direction and cannot be questioned in a Court of law. The Court cannot investigate into the grounds or the sufficiency or otherwise of the materials or evidence on which the opinion is formed and substitute its own opinion for that of the authority concerned.

- a- If such power is exercised in bad faith or for a collateral purpose, it is an abuse of the power and not in reality an exercise of the power and the Court can interfere with such colourable exercise of power.

An hotel is a business and consequently an "undertaking" in ordinary as well as in legal parlance.

Some attribute of locality is common to all cases of goodwill. Goodwill emanates from a particular centre or source. It has a local habitation. It draws custom home to the source from which it emanates. These considerations apply to an hotel, particularly a residential hotel.

The impugned order, therefore, under the guise of requisitioning the building, also requisitions the business undertaking of the petitioner, for the goodwill of his business which is property and is attached to the buildings must necessarily go along with them. This is *ultra vires* Rule 75A of the Defence of India Rules and amounts to depriving the petitioner of his property otherwise than by authority of law and is opposed to section 299(1) of the Government of India Act, 1935.

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**Jurisdiction—Bengal Money-lenders Act (X B.C. of 1940), section 36—Reliefs under, if may be granted, in respect of mortgage-debtor, satisfied by transferring mortgaged premises before January 1st, 1939—Suit under, if lies.**

Where a debt has been discharged, by amicable payment before the 1st January, 1939, the Court has no power to grant any of the reliefs mentioned in section 36 of the Bengal Money-Lenders Act.

It makes no difference in principle where the loan has been fully satisfied either by payment in cash or in kind or by accord and satisfaction.

**Jurisdiction—(Contd.):**

Where, therefore, a mortgagor transferred the mortgaged premises in consideration of the sum found to be then due on the mortgage-bond on an account having been made up and interest calculated at the bond rate of 9½ per cent. per annum compound interest, long before the 1st. January, 1939, and instituted after the Bengal Money-lenders Act had come into force in a suit under section 36 of the Act, for reliefs mentioned therein :

*Held*, that the Court had no power to grant the reliefs. **Bhupendra Nath Roy Choudhury v. Monoranjan Bhui** ... ..

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— *Bengal Agricultural Debtors Act (VII B. C. of 1936, as amended by Act VIII B. C. of 1940), sections 18 and 44—Debt Settlement Board, if has jurisdiction to decide whether a decree of Civil Court is barred—Such decision, if wrongly made, a nullity.*

In an enquiry under section 18 of the Bengal Agricultural Debtors Act, the Board has jurisdiction to determine whether a debt based on a decree of civil court is barred by limitation.

In any case such decision could not be treated as a nullity ; at the most it would be a wrong decision on a point of law reached in an irregular manner and can only be put right by proper procedure. **Hafizuddin Mandal v. Mahim Chandra Ghosh** ... ..

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— *Bengal Agricultural Debtors Act (VII of 1936), sections 40, 40A, 40A(5)—Application before Debt Settlement Board—Reference by Board to Appellate Officer, whether notice under section 34 be issued—Appellate Officer adjudged applicant not to be a debtor and hence notice under section 34 not necessary—Review by Board—Applicant a debtor—Award—Review before Appellate Officer dismissed—Petition of Revision before District Judge under section 40A—Proceedings by Board declared ultra vires by District Judge—Suit by applicant for declaration that District Judge's order is null and void—Such suit, if has—Petition of review before Appellate Officer, though not in form appeal, if really so—Order passed on such petition, though not one passed on appeal, if revisable by District Judge under section 40A.*

The Debt Settlement Board being a tribunal of special jurisdiction must act within its powers which are limited by the statute under which it was created and so long as it does so, its orders whether right or wrong cannot be challenged except in the manner and to the extent prescribed by the statute.

A Civil Court would have the authority to investigate the question as to whether a special or a subordinate tribunal has acted within the limits of its jurisdiction.

But the special tribunal might be invested by the legislature with exclusive jurisdiction to determine its own authority in certain matters, and where it is so invested, the jurisdiction of the Civil Court must be deemed to have been taken away to that extent.

Section 40A of the Bengal Agricultural Debtors Act enables a District Judge to revise any order right or wrong made by the Appellate Officer

**Jurisdiction—(Contd.) :**

within or without jurisdiction and that the section is not confined merely to orders made by the Appellate Officer on appeal.

Although the District Judge set aside not merely the order of the Appellate Officer but that of the Debt Settlement Board as well, he cannot be said to have acted without jurisdiction even if his order be not in conformity with the provisions of section 40A (5) of the Bengal Agricultural Debtors Act.

Though the petition for review of the order of the Debt Settlement Board presented to the Appellate Officer was not in the form of a memorandum of appeal as contemplated by section 40 (1) (d) of the Bengal Agricultural Debtors Act, yet it was in substance an appeal to the Appellate Officer and he should be presumed to have acted within his jurisdiction and not in excess of it.

If an order of the Inferior Court is without jurisdiction, it is capable of being revised by a superior authority in the same way as an order made with jurisdiction: **Mohesh Chandra Shaha v. Abdul Gofur Chowdhury** ... ..

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— *Small Causes Court, if has jurisdiction to try a suit under section 36, Bengal Money Lenders Act (X B. C. of 1940)—Decree passed by Small Causes Court—Decree transferred to Civil Court for execution—Which Court to try the suit under section 36 for reopening of the decree and other reliefs—Provincial Small Causes Court Act, (IX of 1887), Schedule II, Articles 4, 11, 21 and 23*

A suit for recovery of money due on a promissory note was decreed by Small Causes Court at Sealdah. The decree was transferred to the Court of Munsiff at Allpore for execution. The judgment-debtor filed a suit under section 36 of the Bengal Money Lenders Act in the said Court of the Munsiff, for reopening the decree. The only question raised was one as to the forum of the suit:

**Held :** A suit for obtaining relief under section 36 of the Bengal Money Lenders Act is not any such suit as is exempt from the cognisance of a Small Causes Court under Articles 4, 11, 21 and 23 of the Second Schedule to the Provincial Small Causes Court Act. Re-opening of a decree under section 36 is a new species of relief introduced by the Act. The entire procedure is regulated by the provisions of the Act itself and there is nothing in the Act which lends countenance to the view that Small Causes Court Judges are not competent to exercise powers given by the Act.

There is nothing in the Provincial Small Causes Court Act to prevent a Small Causes Court Judge from making an order of restoration of property. **Noni Lal Chowdhury v. Lalit Mohan Mukherjee** ... ..

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**Lease of trust property—Lessee failing to give vacant possession—Lessee realising rent from his tenant after notice to quit—Suit for recovery of property, for mesne profits and damages by trustees against the lessee ; s. 8 Ejectment** ... ..

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**Legislation relating to prosecution of war, if legal ; s. 8 Detinue** ... ..

**Limitation**—*Civil Procedure Code (Act V of 1908), section 48, order 21, rule 11, order 22, rule 12, order 47, rule 1*—*Death of judgment-debtor during course of execution proceedings—Application for bringing on record legal representatives of the deceased judgment-debtor more than 12 years after decree, if a fresh application under section 48 of the Civil Procedure Code.*

"Fresh application" as used in section 48 of the Code of Civil Procedure means a fresh substantive application and not merely an ancillary one made with the object of moving the Court to proceed in the matter of a substantive application already on the file.

When a decree-holder applied to continue execution proceedings against the legal representatives of a deceased judgment-debtor it is not a fresh application for execution so as to attract the provisions of section 48 of the Civil Procedure Code.

Where, however, the decree-holder after he has presented his application for execution, wants to proceed against any new party whose name was not mentioned in the petition or wants to attach and sell any new property not included in it, the application may be regarded as a fresh application for execution.

As under order 22, rule 12 of the Civil Procedure Code the provisions of rules 3 and 4 of that order do not apply to execution proceedings there is no question of limitation for substitution of the legal representatives of the deceased judgment-debtor. **Hrishikesh Saha v. Sreemati Radha Rani Kar** ...

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—*Estates Partition Act (V B. C. of 1897), section 88, order under—Effect of—Section 119(ii), the procedure under, for setting aside the order—When the jurisdiction of Civil Court is excluded—Limitation—Indian Limitation Act (IX of 1908), Schedule I, Article 14, applicability of—'Set aside', implication of.*

The words 'set aside' as used in Article 14 of the Indian Limitation Act. implies that the order complained of is binding on the plaintiffs unless and until it is set aside and the Article cannot have any application when it is not necessary for the plaintiff to set aside the act or order in order to obtain the relief which he claims.

The Collector exercising his jurisdiction under the Estates Partition Act is not endowed with any authority to decide any question of title which might be raised by a party interested in the proceedings. Section 88 only allows the Deputy Collector to enquire into the question of possession and nothing else.

The right which a person has under the general law of bringing a suit in Civil Court for declaration of title is not in any way affected or curtailed by the Estates Partition Act, and with reference to such suits for declaration of title a co-proprietor is in exactly the same position as a stranger.

Section 119 of the Estates Partition Act excludes jurisdiction of Civil Courts only in matters which relate to the mode or determination of the Government revenue or to the details of partition and allotment and

**Limitation—(Contd.):**

It does not oust the jurisdiction of Courts in matters involving questions of title.

Where the lands in dispute are revenue-free properties which did not appertain to any revenue-paying estate at all, the partition Collector had no jurisdiction to partition it under the Estates Partition Act.

**Bimalendu Roy v. Shebait of Detty Gopal Deb** ... 252

**Limitation Act, Schedule I, Article 14, applicability of—**'Set aside' meaning of ; *see* Limitation ... 252

**Litigant, if can take alternative and inconsistent points ;** *see* Pleading ... 297

**Mahomedan Law, interpretation of—**Difference of opinion amongst ancient jurists—Duty of Court in modern times ; *see* Wakf ... 228

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**Mandamus—**Order of Land Acquisition Collector under Defence of India Rules, Rule 75A ; *see* Injunction ... 136

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**Occupancy riyat—Bengal Tenancy Act (VIII of 1885), section 26G—**

*Application under, if may be allowed on terms—*Clause in mortgage deed that mortgagor would only get back possession on paying fair price on buildings to be constructed by mortgagee—Such clause, if 'clog on equity of redemption'—Mortgagee, if has right to retain structure, unless the price of structures is paid to him—Mortgagee, if liable to pay rent—Mortgagee, if must pay something in lieu of rent while in possession.

A piece of land was mortgaged in usufructuary form. The land was then producing nothing. The intention of the mortgagee was to build and there was inserted a clause in the deed that the mortgagor would only get back possession of the land on paying a fair price for any structures that might be erected by the mortgagee. The mortgagor filed an application under section 26G of the Bengal Tenancy Act, to recover possession. The Munsiff, holding that the debt was discharged, made the payment of the value of structures a condition precedent to the mortgagor being put in possession. The learned Subordinate Judge held that the mortgagee had no right to remain in possession and allowed the aforesaid application :

*Held*, that a mortgagor cannot be put on terms by an order allowing an application under section 26G of the Bengal Tenancy Act.

That the mortgage having been extinguished, the mortgagee has no title to the property but by virtue of the agreement he has an equitable right to remain in possession, until he is paid for the structures, as he was induced to lay out money in structures which would ensure to the benefit of the mortgagor.

**Occupancy riyat—(Contd.):**

That the abovementioned clause in the mortgage deed has no doubt the practical effect of a clog on the equity of redemption but it cannot be avoided.

That the doctrine of "clog on the equity of redemption" cannot be invoked by a mortgagor against an equity which he has himself created in favour of the mortgagee. *Jyotilal Mandal v. Birubala Dagi* ...

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**Orders of Debt Settlement Board, how to be challenged; see Jurisdiction** ...

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**Payment made under a mistake of law is not recoverable under the English Common Law, if applicable, where there is a statute governing the question; see Contract** ...

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**Permanently settled estate—Recital in the makarrari lease that the estate had been redeemed from rent or revenue; see Abatement of rent** ...

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**Person, proper, to be substituted in case of death of plaintiff or defendant—Causes of action directly affecting property; see Substitution** ...

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**Plaint, amendment of—Federal Court; see Removal** ...

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**Plaintiff, death of—Right to sue—Executor or administrator; see Substitution** ...

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**Pleading—Plea, alternative and inconsistent—Onus of proof—Each side adducing evidence—Admission by witness—Evidence—No personal knowledge—Agent contracting in his own name, liability of—Principal, agent and supplier—Contract Act (IX of 1872), section 223—Agent—Notice of termination, when reasonable—Contract Act, section 222—Indemnity—Unlawful act—Right of action in respect of indemnity, if postponed to satisfaction of liability—Commission, when payable.**

A litigant is within his rights in taking alternative and inconsistent points, as in the case of the borrower of an article belonging to the plaintiff who was alleged to have damaged that article and pleaded (a) that it was irreparably broken when he had it, (b) that it was perfectly all right when he returned it.

When each side has adduced its evidence, the question of onus of proof has lost all the great importance which at one stage it had, and would only resume its importance if on considering the evidence as a whole irrespective of which side adduced it—the Court were left in reasonable doubt on any material question.

An admission by a witness put forward by one side as a witness of truth is not to be entirely disregarded as evidence against that side merely because, the matter in question being outside his personal knowledge, his statement (if to the opposite effect) would not be evidence in its favour.



**Pleading—(Contd.):**

It may fairly be assumed that a man who takes on the management of a large and ancient business must make himself reasonably acquainted with its past history and if he readily admits that something happened in connection with his business before he came on the scene that admission may be evidence of considerable importance against his employers. If he has not ascertained the truth of any matter about which he is questioned he can always and easily say 'I don't know'.

If an agent expressly contracts in his own name he cannot escape liability on his contract though by section 233 of the Contract Act the other party might elect to hold his principal liable also or in the alternative. The case in which though disclosing the name and identity of his principal the agent contracts personally is not one of those cases; but in that case there is no need to presume such a contract because there is such a contract and the case is covered by the first nine words of the section.

Where a party acted or intended to act as a principal against the suppliers is not inconsistent with his being an agent as against the principal.

In commerce the word agent does not always mean agent nor an independent contractor. It is not misused to describe a man who supplies a manufacturer with his materials.

A contract in which a man who distributes a manufacturer's products to the public is described as an 'agent' (and permitted so to style himself) embodying certain features is a true agency contract.

What notice is reasonable is a question of fact.

In this case both parties contemplated and it was an implied term of their contract that the defendant should in his own name enter into contracts for the purchase of bones to be produced by the suppliers and thereby incur personal liability to those suppliers: If the defendant was not authorised to contract in his own name it cannot be said that it was unlawful for him to do so. Whether the case comes under section 222 of the Contract Act depends on the terms, express or implied, of the authority conferred upon him.

The authority conferred on the defendant was an authority to make contracts for the supply of bones—bones unlimited in quantity:

*Held*, that he was authorised to make contracts with suppliers in his own name and he became entitled to an indemnity against any personal liability in respect of any contract for the purchase of bones, the moment he, his name or the plaintiffs (principals) entered into such a contract.

The defendants' right of action in respect of indemnity is not postponed to his satisfaction of the liabilities against which he claims indemnity. He is under those liabilities.

No commission was payable till the delivery of bones, but it was earned and due (as distinct from payable) when a binding contract for the delivery of future bones was made—conditionally on those bones being delivered or tendered. Whether or not at the date of delivery or tender the defen-

**Pleading—(Contd.) :**

- dant was still the plaintiffs' agent, he was entitled, if and when his work bore its unavailing fruit, to be paid for his work. **Ganges Valley Bone Mills Co., Ltd. v. Kally Nath Dutt** ... 297
- Police**, statutory right of, to investigate cognisable crime, should not be interfered with by the Judiciary by an exercise of the inherent jurisdiction ; *see* High Court ... 19
- Prayer** for damages for the period which followed the Receiver's appointment, if can be joined with that for mesne profits for the period which preceded the appointment—Receiver, appointment of, pending suit for recovery of property ; *see* Ejectment ... 259
- Presumption**—Continued representation of parties in successive executions—Each execution is a distinct proceeding ; *see* Receiver ... 198
- arising under section 114 Illustration (B) of the Evidence Act—Certificate stated in the face of it to have been filed, particulars of it registered under rule 79 Schedule II of the Bengal Public Demands Recovery Act, 1913 and was produced by the office—Certificate, if filed in office ; *see* Certificate ... 13
- 'Proof'** to the contrary—Detinue challenging the factum or the *bona fides* of the order or the fact that the officers of the Government must naturally be in possession of information on the subject ; *see* Detinue... 1
- Proprietor**, duty of—Heavy object suspended over a high way—Support by artificial means ; *see* Damages ... 90
- of property abutting on highway—Damage to member of public—Defence ; *see* Damages ... 90
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- Provincial Government**, if can initiate enquiry into the conduct of a member of an All-India service ; *see* Removal ... 48
- Public demand**—Claim against debtor—Bengal Public Demands Recovery Act, 1913, section 3 sub-section (b) and Schedule I clause (3)—Income-tax Officer purporting to act under section 46 sub-section (a) of Income-tax Act, 1922 addressing to the Collector a certificate certifying it ; *see* Certificate ... 13
- Receiver**—Receiver, appointed under Civil Procedure Code (Act V of 1908) order 40 rule 1, if necessary party to execution proceeding—Effect of, non-joinder—Such receiver, if party to successive executions, when made party in one—Such receiver, if "party to suit" or "representative of party to suit" under section 47 of the Code, when made party in execution proceeding for first time—Application for execution by major decree-holders only—Limitation—Time, if prevented from running—Limitation Act (IX of 1908), section 7—Civil Procedure Code, order 21 rule 10, notice under—Provisions, if apply where both transferor and transferee join in application.

**Receiver—(Contd.) :**

The words "parties to the suit" or the words, "their representatives" in section 47 of the Code of Civil Procedure cannot be extended to include a receiver appointed under Order XL Rule I of the Code to take charge of property which is subsequently sold in execution of a decree suffered by the owner thereof.

Nor can it be said that the omission to make such a receiver a party to the execution proceedings which have led up to the sale renders those proceedings void.

A receiver in insolvency, appointed under the Provincial or Presidency Insolvency Act, stands on a different footing from a receiver under the Code of Civil Procedure.

Case-law reviewed.

Each execution is a distinct proceeding and there is no presumption of continued representation of parties in successive executions.

Where therefore a receiver in office was made party in execution proceeding he or the succeeding receivers, who were not in fact made party in subsequent execution proceeding, could not be regarded as "parties to the suit" within the meaning of section 47 of the Code of Civil Procedure.

Joinder of a receiver in execution proceedings does not make him a party to the suit within the meaning of section 47 of the Code of Civil Procedure.

According to section 7 of the Indian Limitation Act, where one of the decree-holders was still a minor, limitation for execution of decree by major decree-holders would not run against any of them till the minor attained majority inasmuch as the other decree-holders were not competent to give a valid discharge without their concurrence.

The provisions of order 21 rule 16 of the Code of Civil Procedure applied only where application for execution was made by transferee of decree and not where the transferor and transferee both joined.

Where on an application for execution being presented, the Court ordered it to be registered as one by the decree-holders alone, and whether joint execution with the assignee would be allowed or not was left over to be considered after the judgment-debtor and the pro forma decree-holder appeared, there was no occasion for the issue of notice under order 21 rule 16 of the Code of Civil Procedure.

Where an application for execution is made after notice under order 21 rule 22 and order 21 rule 66 the judgment-debtor is debarred from taking an objection that the application was barred under section 48 of the Code of Civil Procedure. **Satyanarain Bonerji, Panchanan Das v. Raja Sree Sree Kalyani Prasad Singh Deo Bahadur** ... .. 198

----- appointed under order 40 rule 1 of the Code of Civil Procedure, if to be considered as party to the suit or his representative within the meaning of section 47; *see* Receiver ... .. 198

----- appointed under Provincial or Presidency Insolvency Act and one

**Receiver—(Contd.):**

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| under order 40 rule 1 of the Code of Civil Procedure, position of ; <i>see</i>                                                                 |     |
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| Receiver's possession of property, nature of ; <i>see</i> Ejectment                                                                            | 259 |
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**Removal—Removal of member of Indian Civil Service—Secretary of State, if can remove—Constitution Act, 1935, section 240, sub-section (3)—Rule 55 of the Civil Services (Classification, Control and Appeal) made under section 96B of the Government of India Act, 1919—Limitation or qualification on the power of the Crown to dismiss its servant at will—Remedy—Certificate, form of—Constitution Act, 1935, section 205.**

*Per Curiam* : The Secretary of State can remove a member of the Civil Service.

The question whether there was any limitation or restriction enforceable by action on the power of the Crown through the Secretary of State to dismiss a member of Indian Civil Service, and if so, whether such limitation or restriction was or was not complied with in fact before the order for plaintiff's removal in June, 1940, involves the true construction of section 240 of the Constitution Act, 1935 :

*Held (per C. J. and Zafrulla Khan, J. : Varadachariar, J. contra) :*

Sub-section (3) of section 240 of the Constitution Act, 1935, imposes in certain cases certain statutory obligations to be carried out before dismissal is effected breach of which will give to the person adversely affected a cause of action.

Where there is an enquiry and as a result thereof some authority definitely proposes dismissal or reduction in rank, the person concerned shall be told in full or adequately summarised form, the result of that enquiry, and the findings of the enquiring officer and be given an opportunity of showing cause with that information why he should not suffer the proposed dismissal or reduction of rank.

*Per Varadachariar, J. :* A comparison of clause (3) of section 240 of the Constitution Act, 1935 with rule 55 made under section 96B of the Government of India Act, 1919 will show that (subject to certain differences of wording) the general principle of notice and opportunity for defence as well as the exceptions to its application have been incorporated in the statute itself while the details of the procedure by which the principle is to be given effect to are allowed to remain matters for rules.

Clause (3) of section 240 of the Constitution Act may be claimed to be a qualification of or even a part of the declaration contained in clause (1) of the same section as to the nature of the tenure.

Rule 55 made under section 96B of the Government of India Act, 1919 is not inconsistent with section 240 clause (3) of the Constitution Act, 1935.

**Removal—(Contd.) :**

Section 240 (3) of the Constitution Act, 1935 is of general application to all officers and is not limited to members of the All-India Services. If, in any case, cause is shown before the enquiring officer, any representation which the officer charged may make will form part of the record and will be considered in due course by the authority finally dealing with the matter.

According to the elaborate procedure prescribed by the latter part of rule 55 made under section 56B of the Government of India Act, 1919, what was required was that the charges should be communicated to the person charged, with a statement of the allegations on which each charge was based and of any other circumstances which it was proposed to take into consideration in passing orders on the case. The officer charged can put in a written statement of his defence, ask for an oral enquiry if he so desires and also ask to be heard in person. The Enquiring Officer was expected to make a record of the evidence and to state his findings and the grounds thereof. The rule did not contemplate the officer charged being given a copy of the finding of the Enquiry Officer and permitted to canvass its correctness. The steps provided for in the rule will be equally necessary under section 240 (3) of the Constitution Act, 1935. There is nothing in the language of clause (3) to indicate that anything more or anything different was to be given after the enquiry had been completed in the presence of the officer charged and the Enquiring Officer had made his report.

The Provincial Government has authority to initiate an enquiry into the conduct of a member of an All-India service.

The matter of the inquiry is primarily one for the decision of the executive authority.

*Per C. J. & Zafrulla Khan, J. :* In the view which they took of section 240 of the Constitution Act, 1935, they thought it unnecessary to decide to what extent, if at all, rules 50 and 55 made under section 56B of the Government of India Act remain in force after the 1st April, 1937. The question whether rule 55 was in force or whether or not it was in fact in the present case complied with is not relevant, for failure to comply with such a rule could not give the plaintiff any legal cause of action.

It is not possible to construe sub-section (3) of section 240 of the Constitution Act, 1935, so as to exclude the jurisdiction of the Court to determine whether or not the opportunity to show cause has or has not been reasonable.

The opening words of section 240 of the Constitution Act, 1935 "Except as expressly provided by this Act" include a limitation or qualification on what follows in sub-section (1) by provisions found later on in the same section as by provisions found elsewhere in the Act.

Breach of sub-section (2) of section 240 of the Constitution Act, 1935, gives rise to a cause of action for a declaration that the dismissal is a nullity as having been given by one without authority to dismiss.

**Removal—(Contd.):**

The proper authority (in the case of Civil Servants, *vis.*, Secretary of State) has at all times the legal power of dismissal at will.

Sub-section (3) of section 240 requires that as and when an authority is definitely proposing to dismiss or to reduce in rank a member of the Civil Service he shall be so told and he shall be given an opportunity of putting his case against the proposed action and as that opportunity has to be a reasonable opportunity, the section requires not only notification of the action proposed but of the grounds on which the authority is proposing that the action should be taken and that the person concerned must be given reasonable time to make his representations against the proposed action and the grounds on which it is proposed to be taken.

*Per Varadachariar, J.*: The Court has no right to examine the correctness of the inferences drawn or conclusions reached by the Enquiring Officer or by the responsible authorities. Any opinion that the Court may form on these points or on the appropriateness of the punishment meted out to the officer cannot be allowed to influence the consideration of the only point open to examination by the Court, namely, the adequacy of the opportunity afforded to the plaintiff.

*Per C. J. & Zafulla Khan, J.*: (Varadachariar, J. expressing no opinion): The proper remedy for wrongful dismissal of a member of Civil Service is damages for wrongful dismissal in breach of the statutory obligations imposed by sub-section (3) of section 240 of the Constitution Act, 1935. He is not entitled to a declaration that he has never been dismissed or that he still remains a member of the service.

The case being an exceptional one, leave to amend is given at a late stage. The Federal Court in this case being the first appellate Court, the Court would give leave to amend and attempt to assess the damages, had there been proper materials for assessing damages before the Court.

*Per Curiam*: The Judges of the High Court added a note to their judgment that several substantial questions of law as to the interpretation of Government of India Act, 1935, were involved in the case and they accordingly certified that it was a fit case for appeal to the Federal Court:

*Held*, that the certificate complied with section 205 of the Constitution Act, 1935, the intention of the Judges being quite plain and there being no particular form of certificate required. **Secretary of State for India v. I. M. Lall** ... 48

**Representation of parties, continued in successive execution proceedings—**  
Presumption; *see* Receiver ... 198

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| <b>Sanction—Drugs Control Order, 1943, section 16—Provision to be strictly observed—Prosecution instituted prior to the giving of sanction—Proceedings, if null and void.</b>                                                                                                                                                                                                                          |       |
| Where special statutory powers are conferred and specific provision is made in the statute as to the manner in which the powers are to be exercised, they should be exercised by the authority and in the manner specified in the statute and in strict conformity with the provisions thereof.                                                                                                        |       |
| As clause 16 of the Drugs Control Order, 1943, authorises the previous sanction of the Provincial Government no valid objection can be taken to the form of sanction given under that clause for prosecution under sub-rule (4) of section 81 of the Defence of India Rules to the effect that the form did not comply with the provisions of sections 49 and 59 of the Government of India Act, 1935. |       |
| The words of clause 16 of the Drugs Control Order, 1943 are imperative and it is essential that the provisions should be observed with complete strictness and where prosecutions have been initiated without the requisite sanction, that they should be regarded as completely null and void, and if sanction is subsequently given, that new proceeding should be commenced <i>ab initio</i> .      |       |
| The prosecution in this case was instituted without the previous sanction required by clause 16 of the Drugs Control Order, 1943, and it is not possible to sever the proceedings prior to the date of grant of sanction from those occurring on and after that date :                                                                                                                                 |       |
| <i>Held</i> , that when the sanction was obtained, no new start was made, and the whole proceedings in this case were null and void. <b>Basdeo Agarwalla v. The King-Emperor</b> ...                                                                                                                                                                                                                   | 8     |
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In case of death of plaintiff, the right to sue survives to persons other than executor or administrator.

Under general principles, the causes of action survive a deceased plaintiff.

The rule laid down in section 306 of the Indian Succession Act, 1925 formulates certain powers of executors and administrators, which does not occupy the entire field of legal representation in matters of litigation. Provided the parties concerned are exempt under section 212 (2) of the Indian Succession Act, 1925 from applying for letters of administration, the proper persons to be substituted in the deceased's place for the causes of action directly affecting property are not only the heirs of a deceased plaintiff or defendant who died intestate but the law requires that all ascertainable heirs should be substituted:

A instituted a suit against his youngest son, D, who is the opposite party in the application for substitution, for a declaration that certain conveyances which he had executed in D's favour, were inoperative and void, and for recovery of possession of property which was the subject-matter of those conveyances and also to set aside a money decree which the defendant D obtained against him. The plaintiff died intestate and his heirs apply to be substituted in his place as plaintiffs in the suit.

D, the defendant, urged that as A died intestate and no letters of administration have been granted, section 306 of the Indian Succession Act, 1925, was a bar to the application:

*Held*, that the right to continue the action survived to heirs, and section 306 of the Indian Succession Act was no bar.

It was also contended that the special facts in the present case make it desirable that one or more of the heirs of A, the plaintiff, who seek to prosecute the suit, should take out letters of administration, as one of the reliefs claimed was recovery of possession of property by some heirs against a co-heir, the claim being based on the allegation that all the heirs had inherited a share in it:

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The period of two months as laid down in section 80 Civil Procedure Code should be taken as exclusive of the day on which the notice is served.

The suit should be regarded as premature and unsustainable *in limine* for non-compliance with the provision of section 80 Civil Procedure Code.

Before the passing of the Bengal Tenancy Act, 1835, the position was that where *deans* lands were resumed by Government and formed into a temporarily settled estate and settled with the proprietor, the settlement of rent by the revenue authorities could not disturb the contractual rights as between the proprietor and the intermediate tenure-holder under the lease. This only happens where the proprietor who had granted the lease took settlement of the new *towzi* but not otherwise.

After the passing of the Bengal Tenancy Act, 1885, section 192 (which now forms part of section 191) did not empower the revenue officer to fix rent affecting contracts made before the Act. Even if he had so fixed rent, the grantor of lease though becoming the holder of the estate could not recover rents on this basis, in excess of that reserved in lease and the tenant could, on the basis of such lease, resist any suit by such

**Ultra vires—(Cont d.):**

landlord for recovery of rent settled by the Revenue Officer even though the tenant did not challenge the entry of rent in settlement roll under section 04 (H).

Except in cases where section 191 Bengal Tenancy Act applies, if there is a contract between the proprietor and the tenant which according to the revenue officer was subsisting at the time of settlement proceedings and which determines the rent in a particular way, the revenue officer is bound to give effect to his own views of the terms of the contract and fix the rent on the basis of the same, and it is immaterial whether the settlement is accepted by the proprietor himself or by a stranger.

The Government is in no sense an agent of the proprietor though it was so described in the settlement records yet it occupies the position of landlord with regard to all subsisting subordinate tenures under the estate. *The Province of Bengal v. Midnapore Zemindary Company, Limited* ...

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It is quite true that on account of the high judiciary office held by Abu Yusuf the Mahomedan doctors attach the highest authority to his opinion on the matters of civil law, though in matters spiritual and those relating to inheritance the views respectively of Abu Hanifa and Imam Mohommed are considered authoritative. It is also a general rule of interpretation adopted by Mahomedan lawyers that when there is a difference of opinion between the three masters (Abu Hanifa and his two disciples Abu Yusuf and Imam Mohommed) the opinion of two is allowed to prevail against the opinion of the third (*Vide*—Mullah's Mahomedan Law, 12th Edition page 25). These rules are however not inflexible rules of law, nor are they of universal application.

In the early days when new points arose and the decision had to depend on inferences drawn from other fatwas or from analogy, it was open to the learned doctors to prefer one opinion to the other which they considered more correct and consonant with the other principles, inasmuch as the three Imams were not lawgivers but merely interpreters of law.

It may be that there was some difference of opinion amongst the ancient jurists but the duty of the Court in modern times is to see which of the two opinions, if any, has been accepted by later commentators who are of recognised authority in India, and if we find that they have

**Wakf—(Contd.):**

consistently adopted one particular view to the exclusion of the other, it would be presumptuous to attempt at this day to decide the point on the basis of original authorities by application of any general rule of interpretation.

It would be wrong for the Courts on a point of this kind to attempt to put their own interpretation on the Quoran in opposition to the expressed ruling of commentators of such great antiquity and high authority (as the Hedaya and Fatwa Alamgiri).

According to Abu Yusuf the Mutwalli is taken to be a deputy of the *wakif* and is consequently removable by the latter at his option, whereas according to Imam Mahommed the Mutwalli is a deputy of the beneficiaries and consequently the *wakif* has no power to discharge him unless he reserved such power at the time of dedication. **Siddiq**

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AND OTHER MATTERS.**

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## TOPICAL TITBITS.

The great war is happily over. The world will hail it as a relief.

\* \* \* \*

India has suffered much during this catastrophe both in men and in material resources. In men she has suffered most through the Bengal famine of the year 1943. In money she has become an absolute dependent on the British sterling currency. She has neither got independence nor dominion status. On the other hand for all these woes and worries of a world wide war she had to bear the burden of a terrible Act namely the Defence of India Act and all the ordinances connected therewith.

\* \* \* \*

We shall not criticise any provisions of this Act nor the method in which it has been administered. All is well that ends well. The war has ended in the victory of our masters. What we need is relief, relief for the millions of India who are suffering from a thousand disabilities on account of the very severe nature of this Act, viz., the Defence of India Act.

\* \* \* \*

We do not suggest that the whole act should be withdrawn forthwith. But before the final peace terms are drawn up and during the intermediate period some of the ordinances promulgated by His Excellency the Viceroy may be withdrawn both for political and for economic reason.

\* \* \* \*

Thus there is no reason why public meetings should be as a rule be under the bans and conditions imposed by the Defence of India Act. There is no reason why the Rule of Section 93 should continue in any province where regular constitutional Government is possible. There is no reason why letters and parcels to foreign countries should be placed under rigorous censorship. And above all there is no reason why political prisoners whether convicted or detained should remain within prison walls any longer.

\* \* \* \*

From the economic point of view, too, the country needs relief. There is no reason why there should be a Controller of stocks or his office in Delhi. There is admittedly great inflation in the land and there should be a free field for money in hand to play its part for the development of the essential industries of India. The ordinance restraining the issue of capital stock may safely go. Again there is no reason why the control of Mills producing cloth should continue any longer. There is dire scarcity of cloth in the land and the sooner the restraint is withdrawn the better for all. Experience has shown that in eighty cases out of hundred Control has simply pushed things underground and has been the progenitor of the Black Market. We do not see now that the war is over, why control should at all exist. We suggest restoration of free trade at once. We suggest effective measures for the abolition of Rationing. Corruption is rampant in the land due principally to the system of control. We are confident it will vanish only if control in its various forms is withdrawn.

\* \* \* \*

There is yet another relief which the public may rightly expect from the authorities at this happy moment. This is relief from the Provisions of the Finance Act based on the Indian Income Tax Act of 1922 amended to date. Initiative and enterprise are essential factors for the progress both of individuals and of Corporations. During the dire period of this six years, war the authorities paid little heed to these factors. Nor could they do this even if they would. But now that the war is victoriously over the citizens may fairly expect that all the emergency provisions imposing very heavy taxes both on individual citizens and on corporations should be completely withdrawn.

\* \* \* \*

Sir Nripendra Nath Sircar is no more. He passed away on Sunday, the 12th of August 1945. For many years he was one of the shining lights of the Calcutta High Court. As a politician he was a moderate. But as a lawyer he had no equal in his later years in the Bar. He began his career as a humble Munsiff and ended it gloriously as a Member of the Executive Council of His Excellency the Viceroy of India. We remember his adroitness, his frankness and his fairness in all serious matters that came before him for solution. In the great Round Table Conference which framed the constitution of 1935 Sir Nripen was the greatest advocate of Joint Electorate which alone could solve the greatest political problem which India faces to-day. He was inordinately



bold where boldness was required. Talents of such high order are rare and the Hon'ble Chief Justice only gave him his due when His Lordship was pleased to mention the death of Sir Nripen in the way he did in an assembly of advocates and judges on Monday, the 13th of August, in His Lordship's own Court. We offer our sincerest condolence to the bereaved family. May the soul of the great Sir Nripen rest in peace.

\* \* \* \*

The Hon'ble Mr. Justice Lodge has imported a new phrase into the field of Law just as the Hon'ble Mr Justice Ormond has imported a new doctrine. Mr. Justice Ormond was pleased to hold in the recent case of *Musst. Ayesha Bibi v. Subodh Ch. Chakravarty* (1) that conversion into another religion automatically severs the marital connection of the party converting himself. Mr. Justice Lodge has been pleased to qualify this doctrine and to limit it to the cases of 'Unhappy Marriages'. See *Sayed Khatoon v. M. Obdiah* (2). There are reasons for and against both the doctrine and its qualification. It is not yet time to discuss the dictum and its delimitation. We shall however keenly watch its repercussion on the Judges of the other High Courts of India. In our opinion the final decision on the point has not yet been arrived at. This perhaps will come and at no distant date from the Judicial Committee. Meanwhile we must admit that the more recent judgment of Mr. Justice Lodge is full of cogent reasoning. Personal Law is a serious thing and to leave it entirely to the will of parties without any kind of qualification in a country like India may lead to very serious consequences.

(1) (1945) 49 C. W. N. 439.

(2) (1945) 49 C. W. N. 745.

## NOTES OF CASES.

### In re a pleader, Tiruppur.

*Legal Practitioners Act (XVIII of 1879) sections 13, 14—Pleader—Allowing suit to be dismissed for default—Negligence—Not professional misconduct—Pleader—Misappropriation of client's money—Acquittal by criminal Court on that charge—Decision of criminal Court to be accepted.*

A pleader duly instructed allowed his client's case to be dismissed for default without informing him and withdrew moneys from Court in cases in which he was engaged and utilised it for

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Mad. 247 F. B.

his own purpose but was acquitted by criminal Court after trial on a charge of misappropriation. On reference :

Held [per *Leach C. J.*, *Chandrasekhara Ayyar* and *Shahabuddin JJ.*—that non-appearance in the suit is merely an act of negligence which does not amount to professional misconduct and that the decision of the criminal court must be accepted and the proceedings against the pleader be dismissed.

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I. L. R. [1945]  
Mad. 304.

### Mohammed Ibrahim v. The Northern Circars Fibre Trading Company, Cocanada.

*Immoveable property—Fixture—"Things attached to earth" meaning of—Machinery attached to building, if moveable—Intention of parties—Same person purchasing land and machinery attached to it from different owners—Intention—Transfer of Property Act (IV of 1882) sections 3, 4, 100—Indian Registration Act (XVI of 1908), sections 2 (6), (9).*

The property known as South India Bone Mills and the site thereunder were purchased from different persons and a first charge was created on the machinery in favour of the trading company by an unregistered deed dated 16th November 1933 and a mortgage of the said property was executed on 6th July 1934. The suit by the Trading Company for their dues was decreed. On appeal by the assignee of the mortgage decree :

Held [per *Krishnaswami Ayyangar* and *Somayya JJ.*—that the degree and nature of attachment of the machinery to the land or building is only a minor consideration and the real consideration is the intention of the person concerned in installing the same, that as the purchase of the machinery and site from different persons was for the purpose of carrying on business for his own individual benefit, the intention of the purchaser is not to keep the two things apart but to make the machinery a part of the land and so it is an immoveable property and the document creating a charge thereon requires registration according to law.

S. C.

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## THE DRAFT HINDU CODE.

The statement of four Hindu Judges of the Calcutta High Court, as also the memorandum submitted to the public by about 30 ex-judicial officers of Bengal, on the draft Hindu Code, both of which we publish in this issue, are remarkable documents, and are valuable contributions to the discussions which have agitated the public some time ago, and have hardly died out. Both are, as was to be expected, sober, dignified and dispassionate. Both have emanated from persons who have a first-hand acquaintance with the administration of the law. Both represent the mature views of persons having an intimate knowledge of the law and the society. But while the ex-judicial officers have been advisedly brief, giving only their views on the outstanding features of the bill, the High Court Judges have gone more fully into the matter and have urged certain considerations which, so far as we are aware, have thrown a flood of fresh light on the salient features of the bill. They are worth more than the vague generalizations which have till now been indulged in on both sides of the question. We would, therefore confine ourselves to this statement, which we may say, has surveyed the whole field in a masterly way, and from the legislator's point of view.

The Judges begin by saying that they dissociate themselves from those who maintain that the Hindu law, being of divine origin, is not amenable to legislative changes. They point out, quite pertinently, that the Hindu law is liable to changes, and has, in fact changed from time to time, according to the change and condition of times. In fact, the Vedic law has been changed by the Smritis, and the latter by the commentaries. That indigenous process of adaptation has now ceased, and the changes which are or would be called for by the "challenge of the times" will have to be done either by Judges or by the legislature. Judge-made law has its uses, as also its abuses; and, at least in bigger matters, which should be beyond the scope of the judiciary, the legislature must step in. But this should be reserved only for large matters and for emergencies. The Judges are sceptical as to whether there is any

such necessity or urge from the public to undertake a wholesale revision of Hindu law. Points of detail may be met, if necessary, by limited legislation, mis-called "piecemeal legislation", which must not however, be a "misfit" with the rest of the law. But the attempt to supplant the Hindu law by a Hindu Code, applicable to the whole of Hindu India, is a violent move in the wrong direction. The Code would not, and cannot be, a uniform Code, as its professed object is ; diversities of local conditions, ethnological, cultural and territorial, which have led to differences in the personal law in different localities, have not ceased to exist ; and in particular, the attempt at the fusion of the Dayabhaga and Mitakshara Schools has led to a hybrid, which has hardly become an organic whole, consistent in all its parts. It is also stated, quite correctly, that the central legislature, with its present constitution, is not at all competent to give a uniform Code for the whole of India. These are considerations which have been urged before ; and the Judges have urged in such a forceful way that they would carry conviction in any unbiassed mind. But an objection, which, so far as we are aware, has not appeared as yet, has been raised by the Judges with the clarity and cogency for which they are well known. They remark that, contrary to the purpose of its authors, the Code cannot be the sole repository of Hindu law. Many matters—and they are mentioned in detail in the statement—have been kept outside the Code, and in such matters one will have to go to the Hindu law and customs without the Code. This perhaps would not have been a fatal defect ; but it so happens in those matters there is an irreconcilable difference between the Hindu law and the provisions of the Code in cognate matters. They also doubt whether it is prudent on the part of the legislature to impose its advanced views on the Community before it is fit for their reception. They are therefore, opposed to the codification of Hindu law which, in their view, is uncalled for, unwise and even harmful.

Coming to specific provisions, the judges observe that the introduction of civil marriages into the Hindu Code is ill-advised. They also assert that the incapacity for marriage, based on consanguinity or otherwise, should be the same in sacramental and civil marriages, although the formalities may be different. On this ground they condemn the proposed validity of certain incestuous marriages celebrated under the garb of civil marriages. They are also not in favour of stopping polygamy or introducing divorce by legislation. As to inheritance, they strongly deprecate the intro-

duction of the daughter as a co-heir with the son, as being unknown to Hindu law, and opposed to the interests of the society and the family. Lastly they observe that it is hardly the time to push on with a legislative measure of such a far-reaching character in the face of the honest and determined opposition of the bulk of the Hindu Society.

One very much regrets that the judges were not invited to meet the Hindu Law Committee during their visit to Calcutta, as was the case with the Bombay judges. The Committee have thereby denied themselves the advantage of a direct discussion with such qualified advisers, whose knowledge, practical sense, and experience are the very highest. As the judges have hinted, quite delicately, they would have, in such a personal discussion, given very helpful suggestions on matters of detail, which cannot be done in a general statement. We have reasons to believe on very good authority, that the Committee were at first quite willing to extend their invitations to the judges as much as to the professed supporters of the bill. But later on, reactionary views prevailed, and the idea was abandoned, as we suspect, for fear of inviting adverse criticism from such outstanding personalities. We hope, however, it is not too late for the Committee to give due weight to the opinions of the High Court Judges as also of the thirty ex-judicial officers as representing the better mind and true interests of Bengal. The condemnation of the Code by such a body of men should satisfy the authorities that all is not well with it, in spite of the platitudes so loudly voiced by its supporters and the millenium it is sure to bring.

The two statements in question will convince every impartial mind that it is high time to shelve the bill in its entirety—no mere scrapping will do.

### THE DRAFT HINDU CODE.

*(Opinion of four High Court Judges.)*

We should be loth to add to the controversy which the draft Hindu Code has already given rise to, but having regard to the importance of the subject, we as Hindus find it difficult to resist the request, which has been conveyed to us from several quarters, to express our views. We do not propose, however, to examine all the provisions of the Code, but shall touch upon some of the broader issues only, noticing, as regards details, just a few of the matters which appear to us to be of outstanding importance. A

detailed discussion would have been more useful and appropriate with the members of the Rao-Committee, if they had thought it fit to invite us to meet them during their last visit to Calcutta.

At the outset, we must express our serious doubts as to the wisdom, necessity or feasibility of enacting a comprehensive Code of Hindu law. The draft Code does not profess to be exhaustive, but it definitely aims at being a stage in the preparation of a complete Code, and that makes it necessary to consider how far such codification is proper or desirable.

Most of the rules of Hindu law are now well settled and well understood, and a Code is not, therefore, called for at all. There is, in fact, no general demand for it; neither those who are affected by Hindu law, nor those who have to administer it have felt the necessity of a Code.

We are not aware that the whole of the personal law of any community in any country has been, or been sought to be, embodied in a Code, and it is our conviction that all communities in India, like the Moslems, for instance, will stoutly resist any attempt to foist a Code of personal law upon them. We see no reason why the Hindus should be treated differently.

As regards matters on which there may be divergences of opinion or conflicts of judicial decisions, legislative action may perhaps be called for or justified to remove doubts or obscurities, but it is quite a different proposition to try and effect fundamental changes in the structure of the law by means of legislation, when changes are not demanded by the community itself. For one thing, it is doubtful how far the legislature, particularly a legislature constituted as it is in this country, may be regarded as a fit instrument for carrying out such social reform.

We do not say that no changes are called for in Hindu law. Like every other system of law, Hindu law must be prepared to meet the challenge of the times. In fact it is the adaptability of Hindu law to changing conditions and circumstances that has helped to maintain it as a living force, and it is significant that the Smritis, which are the ultimate repository of the law, themselves recognise the principles of such growth and development.

Up to the advent of British rule, it was the Hindu jurists and commentators who helped forward the continuous evolution of the law, but this they did only by a judicious selection and exposition of the ancient texts without any attempt to undermine their basic authority. That process has since been arrested, and the only agencies which now exist for bringing about any changes are the

courts of law and the legislature. So far as courts are concerned, their function in this respect is necessarily limited; all the same, as every student of Hindu law knows, the contribution which they have made to its development has indeed been very remarkable. The legislature, however, wields much wider powers, which extend not merely to the interpretation but to the making of the law, but it is precisely this circumstance which in our opinion casts upon it a special obligation to act with the utmost caution and circumspection.

The Rao Committee in their report have themselves indicated the conditions of legislative action in the field of Hindu law. "Nor can we believe", they state, "that the thoughtful reformer will wish to lay violent hands on the ancient structure of Hindu law except for proved necessity. It is a spacious structure, with many schools, and by a judicious selection and combination of the best elements in each, he should be able to evolve a system which, while retaining the distinctive character of Hindu law, will satisfy the needs of any progressive society." But even in making such changes, as the Committee themselves recognize, "the aim should be, so far as possible, to arrive at agreed solutions and to avoid doing anything likely to arouse acrimonious controversy".

According to their own tests, therefore, the Rao Committee ought to drop the proposed Code. Some of their proposals are little short of an attempt "to lay violent hands on the structure of Hindu law", without any clear proof of necessity, and, as should be obvious to them by this time, the "aim" of arriving at "agreed solutions" is beyond any hope of fulfilment.

One of the objects of the Committee is stated to be that of evolving a uniform code of Hindu law which will apply to all Hindus by "blending the most progressive elements in the various schools of law which prevail in different parts of the country." It seems to us, however, that apart from anything else, as matters stand, uniformity is an impossible ideal. The Committee themselves recognized that all the topics of Hindu law do not come within the sphere of central legislation, and, in particular, that of devolution of agricultural land, which, by the Constitution Act, is exclusively a provincial subject. And it may be noted in this connexion that agricultural land constitutes by far the bulk of immoveable properties in Bengal, nay, in the whole of India; and, as has already been judicially held, the expression "agricultural land" embraces within its scope a large variety of interests, from that of the proprietor of the highest grade (to that of the actual tiller of the soil.

The Committee hope that the Provinces will move on the lines prescribed in the Code. We doubt, however, whether this hope will be realized. It is too much to expect that all the Provinces would adopt all the provisions of the Central Act. It is highly improbable that the Provinces, especially Behar and U. P., would adopt Part III-A of the Code, relating to the abolition of survivorship, or Bengal would adopt section 5 of Part II *en bloc*. Assuming however, that this will happen, will the operation of the Code be held up till the last of the Provinces has expressed its views? What would happen if the Provinces finally legislated on different lines? Religious and Charitable Endowments, again, happens to be an exclusively provincial subject, and if shebaitship is deemed to be a part of this subject, complicated questions are bound to arise regarding the devolution of such interest also.

But, after all, is uniformity such a desideratum that it must be purchased at any price? Diversities of usage are inevitable among the very large number of Hindus who inhabit this vast sub-continent, and it was for nothing that the Hindu lawgivers recognized the paramount authority of local usages and customs. Why then, it may be asked, must the Hindus of any particular locality be necessarily called upon to forswear their own distinctive traits and traditions in the interests of a theoretical symmetry? And why, further, for the sake of attaining an ideal uniformity, must the law be cut off from its ancient moorings? Hindu law, divorced from the Smritis and Nibandhas, would be a contradiction in terms.

We are definitely of opinion that any attempt to break down the various schools of law and merge them all in one uniform system is a move in the wrong direction. But this is not saying that there may not be elements in any existing school of law that do not call for a change. Nor would it be right to decry any proposal to introduce such specific changes by legislative action as "piecemeal legislation", and to insist on comprehensive legislation as the only alternative. We think that there is a certain amount of unfounded prejudice against what is usually called "piecemeal legislation". Unlike other countries in Europe, legislation in England has always been piecemeal, and has led to no untoward results. It is piecemeal, compared with the totality of the laws, but may be quite exhaustive so far as that particular topic or branch of law is concerned. In such partial legislation, however, care must be taken to see that it is not a misfit with the rest of the law, as was undoubtedly the case with Act XVIII of 1937 (Hindu Women's Rights to Property Act).



It is pertinent to ask in this connexion whether, apart from the legislative restrictions imposed by the classification of powers between the central and provincial legislatures under the Constitution Act, it is at all possible to draw up an exhaustive Code of the personal law of the Hindus, complete in all its branches, and providing for all possible contingencies. The Code as framed by the Rao Committee appears to us to be itself incomplete in regard to some of the matters which it professes to deal with as being within their sphere of competent legislation. Thus, for example, there are various important questions relating to joint-family and partition, which have not been touched upon at all. By merely abolishing the rule of survivorship or the right by birth, you cannot abolish the Hindu joint family law. Matters relating to management of joint-family, to the Karta's rights and privileges, to the mode of partition and the taking of accounts would still require consideration. Rights and liabilities in connection with joint-family business is another important topic of Hindu law, and so also the important subject of "self-acquisition", so fully dealt with by the commentaries and judicial decisions; but all these have been completely ignored in the draft Code as it stands. When such questions come up before the courts, as they must, they would have to be dealt with under the existing rules of Hindu law, or rather, under the rules of the particular school of law which would be applicable. The Hindu Code would, therefore, neither be the sole repository of Hindu law, nor of a uniform body of law, as it is intended to be.

Holding, as we do, very definite views about the codification of Hindu law in general and the present draft Code in particular, it would not serve much useful purpose to go into details, but we would only refer to some of the provisions of the Code. In the rules regarding inheritance, we recognize with satisfaction that the Committee have brought in many blood-relations who are now excluded from the list of heirs, either because they belong to the female sex, or because they do not come within the scope of the *pinda* theory. We also find that the Committee have, in an admirable way, framed rules for precedence among non-enumerated heirs (Part II, Rules 8-9). These matters were not dealt with by the commentators, and might in our opinion fittingly form the subject of partial or auxiliary legislation like Act II of 1929, which set a useful precedent for such legislation by remedying certain defects in the *Mitakshara* law of inheritance.

There are, at least, two matters in the Chapter on inheritance

in respect of which we find it difficult to support the Committee's proposals.

The first of these relates to the order of precedence among the enumerated heirs, by which the whole group of nine descendants specified in Class II is given priority over every one of the five heirs grouped under Class III. The first two of Class II, viz, son's daughter and daughter's daughter, might perhaps be allowed to come before the heirs described in Class III, and their rights so far as Mitakshara law is concerned have already been recognized by Act II of 1929; but, in our view, the same preference should not be given to the other seven relations mentioned in this group. All of them are, no doubt, descendants of the propositus; but it can be safely asserted that no Hindu regards such relations as son's daughter's daughter, daughter's daughter's son, or daughter's daughter's daughter as nearer than, say, brother's grandson or sister's son—in fact they are regarded more or less as strangers who can have no place in the scheme of inheritance. It is obvious that between a man and his daughter's daughter's daughter, three families intervene. We cannot ignore the normal constitution of a Hindu family and give the descendants of a man precedence over ascendants or collaterals under all circumstances. It is to be noted that out of these nine relations, with the single exception of the son's daughter's son, the rest are not heirs at all under Dayabhaga law. The Benares School recognizes only 3, 6 and 8 as bandhus; and it is only under the Bombay and Madras Schools that all these relations are heirs, but then, again, they come after all the enumerated heirs are exhausted.

The other matter to which we should like to refer is the proposed inclusion of the daughter in the list of simultaneous heirs under Class I. This we consider to be a change of a revolutionary character, which, of all the proposals in the Code, has perhaps evoked the strongest and most widely expressed protest. The framers of the Code themselves do not appear to have been so very sure as to how far their proposal would react on the Hindu mind; and this perhaps dictated a cautious move on their part, in providing for the daughter only a half of the share of a son, as under the Moslem law.

One serious objection to this provision is that it would lead to further fragmentation of the property; and the other is the traditional dislike in the Hindu mind of allowing strangers to the family to come and share the inheritance. Each of these, in our opinion, is a valid and well-founded objection. The splitting up of

estates due to plurality of heirs is an undoubted economic evil, and merely because the risk of such splitting up cannot be avoided, when there is a multiplicity of sons, it does not follow that the evil should be further aggravated by the introduction of a larger number of simultaneous heirs. It will not, perhaps, be out of place here to call attention to the significant fact that in connection with the Wakf Act (VI of 1913), one of the reasons which the Moslem leaders put forward in support of that measure was that it would tend to check this evil of fragmentation in their community.

As regards the other objection, it cannot be denied that a Hindu primarily desires that his dwelling-house and other immoveable properties should remain exclusively in the hands of his male descendants, if there be any. That the framers of the Code were fully alive to this popular feeling is evident from the fact that they have allowed the provisions of the Partition Act of 1893 to be invoked by a male heir against a female co-heir, in case the latter sues for partition; and this relief has not been confined to dwelling-houses merely, but has been extended to all other immoveable properties jointly inherited. But whether the remedy provided is not worse than the disease is a matter for consideration.

Examining the question entirely on its own merits, we also find it difficult to support the proposal of making the daughter a co-heir with the son. No Smriti-writer, ancient or modern, no school of Hindu law, progressive or otherwise, has recognised the daughter as such heir. Neither so far as we are aware, is such a right in the daughter sanctioned by usage in any part of India. The legislature, therefore, is introducing an innovation, pure and simple, and as such it could be supported, only if an exceptionally strong case could be said to exist on grounds of justice and equity. But could such a case be really made out?

We are certainly in favour of making adequate provisions for the indigent daughter, and should welcome any attempt to remedy whatever defects there may be in the present law on the subject. But we can find no justification for going to the opposite extreme, by placing the daughter in a better position than the son himself, as would undoubtedly be the result under the Code. As a wife or a widow, the daughter gets a share in her husband's property; and even as a widowed daughter-in-law, she has her rights of maintenance out of the estate of her father-in-law. In case the husband or husband's father leaves no property, she will be entitled as a widowed daughter to maintenance out of her father's estate. The

unmarried daughter has also her rights under the existing law to maintenance and marriage expenses out of her father's property ; if necessary we should have no objection to legislation in order to secure such rights by creating a charge on the paternal estate. A daughter, married, unmarried or widowed, is also entitled to inherit the *stridhan* property of her mother. Where the daughter happens to be married, but the husband is extremely poor, cases are not rare when her father, if he can, makes adequate provision for her by will or otherwise, and the mother also will not unoften be found providing for the daughter out of her own *stridhan* properties.

The chapter on maintenance, we must say, has been admirably worked out, and removes certain long-felt grievances.

The only other topic that in our opinion deserves serious comment relates to the question of marriage. We are constrained to observe that the Committee's approach to the subject has not been correct. The first thing that the legislature should do in dealing with marriage is to lay down the essential conditions of a valid marriage, viz. physical and mental capacity, age-restrictions, prohibited relationship and so forth. The question of form, which is also essential, then comes in ; and most systems of modern law prescribe a form of civil marriage as an alternative to religious marriage. In a civil marriage, however, the essentials remain the same, except that no religious ceremony need be gone through. It is against elementary rules of civilized jurisprudence to lay down that there should be one kind of prohibited degrees in the sacramental marriage, and a different kind in case of civil marriage. But that is what the draft Code seeks to do for Hindus. Civil marriage should in that case cease to be a part of Hindu law, and must remain a separate branch of the law altogether. We notice with some surprise that the framers of the Code have gone much beyond the rules of the Special Marriage Act, and have permitted marriages even between first cousins, which is entirely obnoxious to Hindu sentiments. Whether civil marriage is made a part of Hindu law or is left to be regulated by the Special Marriage Act, we are definitely of opinion that the essentials of a Hindu marriage, except in the matter of ceremonies, should be the same in either form. In our opinion, the best thing would be to keep the civil marriage out of Hindu law altogether, and leave it to be regulated by the Special Marriage Act, with a repeal of those provisions thereof which provide that even when Hindus marry thereunder, they would be governed by the Indian Succession Act.

While on this subject we might perhaps offer a few suggestions

with regard to prohibited degrees. We are of opinion that the *sapinda* relationship should be reduced to five degrees on the father's side and three degrees on the mother's. This is quite in accordance with the *paithinashi* rule which is followed in Bengal, subject at the same time to the *trigotra* rule. As regards intercaste marriages, we think that such marriages, if they have taken place in fact, should not be regarded as invalid. As regards monogamy, we share the general view that as polygamy has practically disappeared from Hindu society, it is not necessary to enforce monogamy by legislation. We are entirely opposed to introducing divorce into Hindu law. We do not think that the right of divorce has conduced to greater social well-being or harmony in the systems where this right exists. At any rate the Hindu conception of marriage as a sacrament is diametrically opposed to the idea of divorce, and we feel this idea is abhorrent to the average Hindu. We may add that if divorce is at all allowed, the grounds of divorce should be such as are recognized in other systems where it exists, and not what the Committee have thought fit to provide.

As we have said already, our comments on the Code do not profess to be exhaustive, but we believe we have said enough to justify our disapproval of it as a whole. Hard cases do and may arise under the existing law, but can human ingenuity devise any system of law which will be a guarantee against hardships in individual cases? Lastly we would add that the present time is singularly inopportune for introducing such controversial legislation.

CALCUTTA,  
12th June, 1945.

R. C. MITTER  
B. K. MUKHERJEE  
C. C. BISWAS  
A. N. SEN  
(Judges, High Court, Calcutta).

### THE DRAFT HINDU CODE.

[Opinion of the ex-members of the Judicial Service.]

We the following Hindu ex-members of the Judicial Service of Bengal, deem it necessary to express our views on the draft Hindu Code. In our view the Code is unnecessary, and even harmful; it is opposed to the ideas and sentiments of the Hindu society; and some of its provisions, such as those in marriage and inheritance, are calculated to cause serious disturbances in the society and family, which will surely lead to the weakening of the economic, political and family life of the community.

At the outset it may be observed that the need of the codification of Hindu law has not been made out. As persons connected with judicial work in the province, we have never felt any difficulty in administering the Hindu law for want of a Code. The Hindu law, as at present administered, is as definite, precise, and well-organised as any Code-law. And further, we have never felt that the present Hindu law is disliked by the litigant public which have come before us. Of course we admit that in those matters—and they are few—where the Hindu law has been wrongly interpreted by the highest courts, or where the law has become archaic, partial legislation may be beneficial, and even necessary. As instances of such limited legislation, we may refer to the Hindu Inheritance Removal of Disabilities Act (XII of 1928), Hindu Inheritance Amendment Act (II of 1929) and Hindu Gains of Learning Act (XXX of 1930). These statutes have been well incorporated in Hindu law, not being opposed to its basic principles. We are however convinced that a codification of the whole of the Hindu law will give it a rigidity which will interfere with its normal growth and its easy adaptation to altered circumstances, which has so long been its most remarkable characteristic.

We are also of opinion that the attempt to have a uniform personal law for the whole of India is misconceived. If codification is at all thought advisable or even necessary, there should be as many Codes as there are schools of law. The difference between these schools is, in many cases, fundamental, and is due, as every student of Hindu law is aware, to the difference in local conditions. The attempt to impose on a group of people a law which is inconsistent with their social, economic and domestic conditions, and contrary to their ideas, is opposed to all sound rules of legislation.

We are convinced that the new marriage rules will break up the society, as much as the new inheritance rules will break up the family. We are not satisfied that either course is necessary.

Lastly, we would point out that to push on a measure of this character, which involves no state policy or public necessity, without securing a substantial measure of support from the community itself, is ill-advised. The bulk of the Hindu society has not as yet been acquainted with the main features of the bill. The all-India enquiry which the Committee recently undertook was at the most superficial. As it is, the thinking section of the community has, with some exceptions, expressed their views adversely to the bill. For instance, the lawyers of Bengal have, as a class, spoken deci-

dedly against it, and we readily join them in opposing it. We would earnestly impress on the authorities to consider whether at a time when people are anxiously engaged in a struggle for existence owing to abnormal conditions, a drastic alteration in the social and family law of the Hindus has become an urgent necessity.

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|----------------------------|------------------------------|
| Satindranath Guha.         | Binod Bihary Roy.            |
| Bimalchandra Chatterjee.   | Prankumar Basu.              |
| Kshirodeswar Banerjee.     | Ramdul Deb.                  |
| Satyaprasanna Majumdar.    | Naliniath Das Gupta.         |
| Surendranath Mitra.        | Kunjabehari Ghosh.           |
| Aditya Chandra Dutta.      | Makhanlal Mukherji.          |
| Khagendranath Dutta.       | Niradeswar Banerjee.         |
| Hem Chandra Mitter.        | Bamacharan Chakravarti.      |
| Saratchandra De.           | Hemchandra Sanyal.           |
| Bakulal Biswas.            | Lalitmohan Basu.             |
| Ramlal Banerji.            | Sarat Chandra Roy Choudhury. |
| Bankubehari Bhaduri.       | S. Mukharji.                 |
| Naranath Mukherjee.        | Nripendra Nath Guha.         |
| Nirod Ranjan Guha.         | A. C. Ganguly.               |
| Rohini Kanta Mitra.        | B. B. Chatterjee.            |
| Shoilesh Chandra Banerjee. |                              |

*(Retired District Judges and Subordinate Judges.)*

### TOPICAL TITBITS.

How many kinds of murder are there? An orthodox lawyer will at once reply "Why? of two kinds only-culpable homicide amounting to murder and culpable homicide not amounting to murder". These are in the Penal Code.

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We salute the orthodox lawyer. He is correct within his own sphere. But his definition is not extensive enough. He only knows some murders under the Law. He forgets others entirely. He also forgets murder in the name of law whether national or international.

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Thus under the National Law an unlawful assembly may be fired at and people may be murdered in the course of firing. The authorities committing such murder are condoned. A man may kill another in selfdefence if he himself is threatened with death or with injury that may cause death. His act also is justified under the National Law though it is nothing in substance but murder. Likewise murders in course of legitimate warfare are allowed under the International Law. Soldiers fight and kill their enemies. They commit homicide. But they are not triable for these murders. International Law condones this action and they themselves feel no qualm of conscience for it.

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There are however murders of an entirely different kind. These are indiscriminate murders not under the law but only in the name of law. A V. Bomb without a pilot flies from France and falls on England murdering hundreds. This is murder in the name of International Law of War. An Atomic Bomb is released in a whole city and lakhs of people die at one stroke. This too is murder in the name of International Law which condones killing during war. Again poison gas is let loose on an Abyssinian army and they die in thousands. This too is murder in the mere name of International law. Ruthless use of new weapons of murder unprecedented in history and untried by time and experience has not yet got any international sanction. At present they only engender hate both for the scientists who invent them and the nations that use them indiscriminately.

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There is however yet another kind of murder in the name of law. This we see for the present in the sentence passed on the ninety years old Marshal Petain. We do not really know whether international practice is running. Nations fight and move under certain definite policies under different circumstances and situations of fact and leaders lead them in such times to the best of their abilities. And during a war leaders of nations at the top are not in International Law treated by any specific provision or fiction to be so many hostages to be murdered in case the nation is defeated or adopt a different policy. Thus if England were defeated we could not support under any principle the farce of a trial of Mr. Churchill or Mr. Attlee or Mr. Eden under the Germans in the name of International Law. Likewise now that the war



is over and this is the twentieth century when life is differently valued than in the ages of pure revenge and retribution we cannot support the trial of individual leaders of the National parties of any nation for their policy during the war. The trials in all such cases based as they are on revenge are vitiated. They are mere farces and the sentences of death passed in them are no better than murders in the name of law and justice. If leaders of nations are treated like this after a war or civil turmoil the future of Democracy is doomed:

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A great patriot and national hero is dead. It is Subhas Chandra Bose. This hero and patriot sacrificed all his prospects for the nation and its freedom. He was an I.C.S. but he renounced this high position and came under the banner of Deshabandhu Das in the early twenties of the century. Since then he fought much, organised much and suffered much for the nation according to his own light. When war began he thought that he could bring freedom to India through Japanese victory and Japanese co-operation. We are not believers in the theory that freedom may come as a gift from a foreign nation. But the patriotism of Subhaschandra and his popularity are beyond all question. He was a great apostle of Hindu-Moslem unity and fought tooth and nail for it. We bow to his departed soul in reverence. May it rest in peace. He was surely one of those of whom Shelley speaks in his *Adonais* in the following glowing terms :—

"The splendours of the firmament of time  
May be eclipsed : but are extinguished not  
Like stars their appointed height they climb ;"

He did climb to his appointed height and if end justifies the means, as those who support the use of atomic bomb say, nothing that he did for his nation out of his deep patriotism will ever be condemned by the nation as a whole.

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In the death of Srijukta Sarala Devi Chaudhurani, Bengal has lost one of the shining lights of her public life. This lady born in noble family and wedded to a very noble husband was herself noble in every way. Pious in habit and industrious by nature she helped every cause that was just and fair during her lifetime. In the meetings of the elite of the city we found her present whenever health permitted and in the meetings of workers who

have so little of education and culture we found the same stately figure carrying with her a silent power of inspiration. In politics she was a supporter of the Gandhian policy of nonviolence and constructive work and worked silently for its success like the great Acharya Sir Prafulla Chandra Roy. We offer to her soul our deep homage of reverence. Bengal public life already poor is distinctly poorer to-day by her death. May her soul rest in peace.

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Blessed are the peace-makers-for theirs is the Kingdom of Heaven, says the Bible. But will heaven be assured for those who have brought peace with the Atomic Bomb which massacred millions and with treacherous breaches of treaties? We cannot give any answer. But the answer has been fully given by a primate of England and by the holy Pope of the Vatican in Rome. The Pope proclaimed that the use of the atomic Bomb was brutal. It could not give peace to mankind. The primate of England refused to allow service for victory in his church because a victory bought for Atomic Bomb was not worth having if the interest of the humanity as a whole is taken into consideration. But the Peace-manufacturers of the stamp of Mr. Churchill and Mr. Truman continue to support it nay, gloat over their success. We hope the Biblical saying will not be true at least in the case of the peacemakers of Trumanian and Churchillian Brand. No International Law could support such breach of treaties as Russia took recourse to when she attacked Japan from the back nor will human heart ever pardon those who used V. Bombs, Shuttle-bombing and last though not the least the brutal Atomic Bomb which unless restrained by law or some kind of special International ban, may entirely decimate mankind from the surface of the earth.

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India expected more from the first speech of His Majesty the King in Parliament than she has got. She has been disappointed. The blind tory goverment is gone and labour whose outlook, to speak in the words of Pundit Jahar Lal is not mediaeval, is now in power. The speech of the king, as far as we know, is drawn up at the suggestion of the premier. We therefore, expected that in return for the blood shed by the Indians for victory and for other substantial help freely given for war His Majesty would be

advised by the Labour Prime Minister Mr. Attlee to not merely to implement but to supplement substantially the much emphasised Cripps offer and the recent Wavell offer. We unfortunately find nothing of the kind in the otherwise momentous speech. Major Attlee on the other hand is singing the praise of his erstwhile Chief Churchill and is freely and boldly advertising British Monarchy to the world.

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Modern politics is a kind of fire in which Monarchy is melting. The democratic and communistic states would not allow a king but would allow more than royal power to a dictator chosen by the dominant party. Thus during the last six years of world war many kings had a good shake while some like the King of Belgium have been put out of Court. But the race of Kings and Emperors still survive. Thus Japan has an Emperor, England has a King and an Emperor and some smaller states of the world still have Kings. Nor could it be said that they are all dummies with little or no power of their own. We are not supporters of the indiscriminate dethronement of kings. We had the bitterest experience during this war as to how democratic leaders could prove far worse than kings and emperors when power is with them and how the most formally-chosen leaders misled mankind to the massacres of war and tax credit for it too. We would much rather support monarchy, monarchy of the British Type where the king melts in the fire of modern political opinion and becomes an altogether different thing (we should not call him a doll) every time the party government changes and adopts a different policy for the nation. He is at least a restraining force with the glamour of tradition and time and as such a kind of check to reckless leadership of the Hitlerian, Stalinian, Rooseveltian or Churchillian brand.

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So, Japan too has surrendered. When three great powers attack from three sides some with treachery and some with deadly weapons like Atomic Bombs even the bravest nation must succumb. It would be sheer slaughter of subjects to continue a fight under such circumstances. The Emperor of Japan saw this and has wisely cried halt. The state of Japan in modern politics is not very clean. Nobody could approve of her long war with China or her sudden attack on the Pearl Harbour without formally intimating her enemy according to International Law that she was at war. Still it must in justice to her be said that she

has only been technically and not actually vanquished. Her Army, Navy and Airforce were till lately a terror to military leaders of the order of Lord Mountbatten and her grim courage will pass in the history of the world as one of the wonderful tradition of an Asiatic race.

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Can a trust or legal obligation arise without a formal deed? Their Lordships of the Judicial Committee had to decide this question in the *All India Spinners Association v. Commissioner of Income Tax, Bombay* (1). They held that a trust or legal obligation may arise in favour of an institution of general public utility without a formal deed if the constitution of the institution or association allows it. Now the constitution of an association whether incorporated or not is in substance a contract or to use the exact phraseology of law a mutual contract among the members. Thus the Articles of Association of a limited company is treated as a contract, a mutual contract among the shareholders and the would-be shareholders. Likewise the constitution of the All India Spinners Association, though not incorporated, might be taken as a contract among the members of the Association. The trust arose without a formal deed under this contract and their lordships held that it did arise out of it in this particular case.

But suppose the institution is a High English School with a Managing Committee having rules for its constitution. Apparently such an institution is one of general public utility. Suppose again that three persons sit down and agree to raise a building for the institution from personal funds and public subscription. And they raise such a building on a piece of land belonging to one of them with his consent but without a deed of transfer for the land. Will a trust or legal obligation arise in favour of the school both as to the building and as to the land?

The question is a knotty one. But we see no reason however why according to the decision under consideration such a trust or legal obligation should not arise under such a contract and why the school should not have both the building and the land and why if the trust is all right in law it should not consume both the building and the land though the right in the land in the absence of a conveyance may either be (a) a license or (b) a good equitable right to be perfected by payment of compensation to the owner of the land who was a party to the contract and gave his consent or merely stood by when the building was raised.

(1) (1944) A. I. R. (31) P. C. 88.

Once it is held that the building and land is saddled with the trust or legal obligation without a formal deed the other steps will naturally follow as far as they could proceed.

S. C.

## WAR CRIMINALS IN INTERNATIONAL LAW.

BY

Mr. Sanjib Chaudhuri, M.A., B.L.,

The last great war has made a term familiar. This term is 'war criminal'.

Who are war criminals? The old international law knew of no such term. It is an entirely new invention generated by some extreme forms of cruelty. It does not however fit in with International Law as it is.

When a war has been declared between two sovereign independent states the military personnel of one state is at war with the military personnel of another state. It does not matter whether such military personnel are ground force, naval force or air force. But every civilian of one independent state is not individually at war with every civilian of the other state. Thus according to International Law any English man in England is not entitled to kill during war any German in England. The local law or municipal law of England would not allow such a step. And it is forbidden by International Law of all the States of the world. Such an offender however is not a war criminal. He is a criminal of the municipal law.

Again, the military personnel of one nation at war killing the military personnel of another in the field of war or in due course of war are not criminals of war. War allows and condones all necessary and legitimate killing of the enemy. It does not allow naked violence on civilians, on women and children, on prisoners of war, on an army that has in fact surrendered. For all such offences the recognised procedure is reparation. As for the legitimate killing during the very course of the war for bona fide victory this ends in no trials when victory has been won. It ends in Treaty and the terms of the Treaty officially ending the war. The Treaty may demand cession of territory. It may demand

reparation for injuries done or expenditure incurred. It may demand, as was common in the old world, that certain persons including the king and some of his generals all being military personal should be shot or hanged. But there is as yet no Treaty demanding that some persons involved in the last war should be tried in a court of law whatever may be its name. From this it follows that even the Chief Magistrates in Democracies and Kings in autocracies or constitutional monarchies who may be shot or hanged are not war-criminals. They are treated as offenders of International Law and punished for the factum of waging the war itself by the very terms of the Treaty that closes the war. They cannot be technically called war-criminals.

We frankly confess that we cannot quite see how Ribbentrop or Tojo or Petain or Laval could be tried as traitors or war criminals after their country's surrender or the Allied Victory. All that the victors could do was to demand as a term of the Treaty that certain persons should lose their life or be otherwise punished. There could be no judicial trial of these people according to International Law. Similarly it is ugly to us to conceive that Truman or Churchill or Attlee would have been tried in any court of Law if the Allies were defeated. They could not have been tried as war criminals. And this because there is no such trial sanctioned by International Law. This would seem to be all the more reasonable when we consider that after a victory it is the spirit of revenge that rules. And we all know from common experience that where revenge reigns justice decently hides herself in a corner that there is as yet no universally recognised international court of criminal justice which could judge them fairly.

Our point of view will be clearer if we consider a few more points in detail. And these points are the status of War prisoners and the status of the military personnel of the two sides in a civil war. A civil war is an internecine political struggle which has assumed an undue proportion and has therefore been recognised as such by some independent neutral sovereign states. At the end of such a war the victorious party cannot treat the individual prisoners of war as war criminals. They must have in International Law the status of war prisoners. Thus if there be a rebellion in India declared against the established authority and it has assumed a proportion in which foreign neutral powers recognise the rebels as a party in war and concede to it the belligerent status, the established authority if it wins at long last, may

draw up some terms of a treaty with the defeated faction and thus summarily execute some persons according to a term of the Treaty itself. It cannot hold a trial for the purpose (there being no precedent in International Law for such a procedure) dubbing the warriors of the opposite side as war criminals. From this point of view the trial of the Indian National Army of the great rebel leader Mr. Subhas Chandra Bose does not appear to be pertinent and legitimate. Similarly prisoners of war are mostly defacto murderers to whichever side they may belong. They cannot be tried as war criminals by any nations.

Who are war criminals then? Civil Officers of State are exempt from killing during the very course of a war as also are nonresisting civilians. As we have already remarked, so are women and children. And so are some medical units and civil units like the postal staff. We think therefore that if the new term war-criminal is to be definitely imported into Public International Law it must have a due delimitation and such delimitation must be confined to the following classes of individuals.

- A. The spies of the enemy.
- B. The individual deserter.
- C. A civilian who willingly submits to the enemy or aids him otherwise from selfish motives.
- D. Those prisoners of war who break discipline.
- E. Enemy saboteurs civilian saboteurs unrecognised in a civil war by any sovereign independent State.

It is these who alone may be tried as war criminals in some Court.

We may incidentally remark that the Indian National Army of Mr. Subash Chandra Bose could not according to International Law be tried in the way they are being tried. It is, as its name indicates, a whole Army and the question of individual desertion cannot arise and there can therefore be no trials of individuals. The rebel leader Mr. Subhas Chandra Bose was recognised at the time of the formation of the army by several famous sovereign independent States as a warlord trying to free his country from foreign domination. And last not the least the rebellion was motivated not by any sordid spirit of personal gain or fear of defeat but by a genuine desire for the Freedom of a whole land fighting already through its congress for more than fifty years for political independence. If there were any capitulation between the two sides and these ended in Treaties containing some terms as to the treatment of some particular individuals some steps against

them could be executed. As it is, the whole procedure is illegal in International Law.

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## REVIEWS.

**Professional Conduct and Advocacy** by K. V. Krishnaswami Aiyar, published by the Oxford University Press, Second Edition, 1945. Price Rs. 7-8 :

This is the book form of the lectures delivered to the apprentices-at-law of Madras by the learned author at the instance of the Madras Bar Council. The publication has been highly spoken of in all quarters and there is no reason why we also should not share the very same opinion that has been universally maintained about it. That a second edition of the book has been called for is an unmistakable proof of its wide popularity and immense utility. The ideas adumbrated in it are no doubt mostly such as are to be found in similar other publications, but that does not make the publication in any way a stale one, as the learned author has infused into it an amount of freshness and vivacity, which can really be called rare. Being a lawyer, the learned author is somewhat fond of quoting authorities in support of his conclusions. This is a time-honoured practice generating a conservative mentality of adherence to precedents but not very helpful to the advancement of progressive ideas. Thus, at one place of his book, the learned author refers to the advice of Socrates to the young Greeks to the effect that it is the ideas and not the expressions that should be hunted for. This matter has been so many times repeated in our literature that it has become a common place belief with us and we have never stopped to independently consider the merit of this great utterance in the light of our practical experience. In our daily life we come across innumerable instances of persons with ideas but without expressions, and of persons having expressions but no ideas. Instances of mute philosophers and loquacious fools are not rare. Much good philosophy has been lost to this world for want of power of expression on the part of its unfortunate possessor and much nonsense has got currency through the force of trumpeting. The learned author has held out a lofty ideal of professional ethics; that is all very good, because it is always desirable to work with a lofty ideal before oneself. But ideals are



always ideals and the stern realities of life often break through them. This is the irony of fate and the tragedy of life. Works on professional ethics have now multiplied beyond a readable magnitude, and yet the administration of justice has oftener than not miscarried. There is a rank disease in the body politic of the judicial system of the country, but so far as we are aware, no genuine effort up till now has been made either to diagnose the malady or to think out any remedy for it. There are many commonplace observations founded on professional cant in the book which might have as well been omitted from it. For example; the learned author at one place says that an advocate ought not to accept a wicked case. Wickedness is always a question of relativity and admits of degrees. A person may not be guilty of so much wickedness as has been attributed to him and may justly like to be defended against the more heinous charge. To our mind, there will be no professional immorality in undertaking such a defence. There are many similar other ideas expressed in the book which are indefensible, but all the same, they have been marshalled well and stated artistically. The production is a beautiful one and earned a well-deserved encomium, be its intrinsic worth whatever that may be. Apart from the adverse criticisms to which it may be prone, it is bound to be a valuable adjunct to every lawyer's library and should be read with a certain amount of earnestness specially by the beginners, and the apprentices-at-law for whom the book has been primarily meant. It will at least supply them with some specie to start the business of life with. The get-up of the work leaves nothing more to be desired.

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**The Bengal Tenancy Act:** By D. Bose, published by P. Basu, 1944, Vol. II, Price Rs. 5.

We have already reviewed the first volume of this book in the pages of this Journal (see 79 C. L. J. 18n), and are glad to receive this second volume completing the learned author's arduous work with the subject. Having regard to the difficult times, it is certainly a great achievement for the learned author to bring his work successfully out of the Press within such a short compass of time, and we sincerely congratulate him upon the same. In this volume too, the general scheme and object of the publication as outlined in the first one, has been well maintained and it is hardly necessary for us now to repeat what we said about the salient features and merits of the work on its first appearance. The only thing that

requires to be adverted to at this place is that this volume embracing only the procedural provisions of this particular statute, the learned author's practical experience as a judicial officer has been of great help to him in successfully treating of the same. Be it suffice to say that the book has received that recognition from all quarters which it so justly deserves. With the progress of time, the book is expected to undergo revision work several times and become a complete finished production in due course, unless in the meantime the project of jettisoning the Permanent Settlement completely revolutionises the land-law of Bengal. The get-up of the book is just what can reasonably be expected of a war-time production.

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**Digest of case-law for fourteen years:** By V. M. Kulkarni, published by the author from Lahore, Vol. IV, Price for the complete set Rs. 66.

This is the fourth volume of the above-mentioned monumental digest. We have already placed on record our estimate of the utility of the publication [see 79 C. L. J. 17n], and have availed ourselves of the present opportunity of having a new volume for reconsidering what we said, about the merit and utility of the publication on the last occasion. In this volume also the general scheme of the publication has been fully maintained and the notes on cases incorporated in it have been prepared and summarised with the same consummate skill, admirable industry and meticulous care as before, and hardly admit of any improvement. Unfortunately for ourselves, we do not find the publication much in evidence in our law Courts in this Province. Perhaps this legal publication has appeared in the field in an inopportune moment, but it is gratifying to notice that the learned author has admirably kept up his spirits and is going on vigorously with the work absolutely undismayed by circumstances. This religious devotion to work deserves to be rewarded and unless the profession realises this fact and rises to the occasion to extend to it the reception that it so richly deserves, the effect will be to discourage all future ventures of this description to the great detriment of the legal profession itself. It is really painful to us to think how the legal profession by its apathy towards useful legal productions has taken away the incentives from all industrious undertakings. However, we should very much like to impress on every body concerned the necessity of according a hearty welcome to the publication under review.

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# The Calcutta Law Journal.

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## TOPICAL TITBITS.

'Is Mercy dead from modern political life?' This is the question that a friend put me sometime back.

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I began to think on the matter at once. 'Is Mercy really dead from modern political life both national and international?' Several facts at once entered my mind and they are all facts of modern political life both in India and the world<sup>3</sup>outside.

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There was once a good Queen Victoria who pardoned millions of the rebels of the great Mutiny of 1857. The same good queen pardoned thousands of Boer Warriors who fought against the British. Did she forget the words Law and Discipline then or did she think that these have got no meaning or importance in politics? No, She knew both the words. But something higher than Law and Discipline inspired her from within and she instinctively realised that while mass massacres engender hate, mass clemency works exactly in the opposite way. It rouses mass feelings to admiration and reverence and thus smoothenes the way for better discipline and an easier<sup>11</sup> execution of law.

\* \* \* \*

But the modern world has lost those great ideals. In the words of Wordsworth, 'It is busy getting and spending' and we may add it is busy 'killing also' thanks to the new machines of science. 'You can't draw an indictment against a whole nation' said the great orator and legal philosopher Edmund Burke. Still this is what the modern governments are doing both in India and outside. En Masse arrests for political ambition are done without the least qualm of conscience and more than once here after the death of the good queen Victoria have indictments been drawn against the whole Indian nation. In the world outside such indictments were drawn in 1918 against Germany and they are

again being drawn against Germany, Japan and India in the present day

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History of nations has proved that such indictments produce no good. The victors indicted Germany in 1918. Germany rose within twenty years and taught them a dreadful lesson though she fell again. Japan has fallen more due to science and a rough violation of Treaty by Russia than due to any *defacto* defeat. The other side is about to indict her. India tries again and again to gain her freedom and every time she attempts for this, her leaders are encaged, her peoples' houses are burnt and the patriots of the nation are sent over and again with or without a trial into jail. And all this is done in the name of some law national or international. The reactions are terrible. Fallen nations rise over again and defeat the very object of the use of law and discipline in the field where wider principles of consideration and mercy should prevail.

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And what do we see in the world after this unwise war brought about by unwise and unforesighted leaders of all the belligerent countries? We have watched with keen interest the indictments of Marshal Petain, a ninety years grand old man of Europe. We have heard of the trial of leaders of world-wide fame like Laval, Ribbentrop and Goering? We also hear of mass-sufferings, mass indictments, mass humiliations. Revenge rules where consideration and mercy should. And revenge invites revenge. You cannot terrorise for a long time a whole nation like the German nation or the Japanese nation brainy, bold and full of material and intellectual resources. What you need here is not the mean policy of revenge nor the sugar-coated sentences in the name of law and order but the wider and wiser Victorian policy of Consideration and Mercy. If you are really democratic, your eyes should be directed towards Internationalism. You do not help forward the cause of internationalism by brutal indictments of whole nations, whole classes of fighters for national independence and whole sets of leaders whom whole nations worshipped as the guides of their destiny for many many years. If you do, this revenge is someday sure to break on your own head in some form or another.

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Coming nearer home we have the cause of the deserters of the

army, of all Indian soldiers who went over to Japan thinking that by that means they could usher in an era of freedom. The factum of desertion is culpable from the point of view of municipal law and though not of the International one, and all these people are liable to punishment of some kind or another. But were they morally culpable also. Law and discipline go only to a point and not beyond. They cannot invade the sacred precincts of the cause of national Freedom and the fight for national Freedom. It is through the violation of age-old law and discipline from time to time that England is where she is, France is still universally honoured though she was badly defeated only recently, and America is free. If nations as a whole do not respect the urge of freedom in nations as a whole and press law and discipline or revenge to a field where higher considerations of Concession and Mercy should prevail, the future of nations and of humanity as a whole is assuredly doomed. The vision of the great poet Tennyson,

"The Parliament of men  
The Federation of the world"

already looms large before humanity as a whole. Its cause ought to be furthered by the nations whom tactics and science and not morale of the right type have recently given victory. It is a pity they are only hindering it by their uninternational and unforesighted statesmanship.

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We belong to the world of Law and Discipline. We revere both. But what we sincerely think in the present situation of the world is that Churchillian, Trumanian and Stalinian policy can only give birth to howls while the wide Victorian policy, if adopted will usher in an era of peace and brotherhood among men for at least some decades to come.

\* \* \* \*

Modern jurists admit that law cannot be entirely codified and that in spite of the best possible codification of law there may arise some situations of fact for which, literally speaking, there is no specific legal provision for application. The Judges know that such cases do arise and the jurists call them Unprovided Cases. One such case recently came up for consideration on the original side of the Calcutta High Court before Mr. Justice Khundker. It is the case of *Bireswar Ghose v. Srish Chandra Ghose* (1).

(1) (1945) 49 C. W. N. 765.

The central question was whether a right given specifically to the executor and the administrator could be extended in the absence of letters of administration to the heirs also particularly when succession to property by the heir does not require any letters of administration. Mr. Justice Khundker in our opinion hit the nail aright when he applied to the case the dictum of Lord Esher in *Finlay v. Chirney* (1) where His Lordship emphasised not the person of the successor so much as the Cause of Action itself. Says His Lordship.

"Of course it is said and said justly that the damages recovered in the action affect the property of the respective parties. But that is not the proper test to apply. The true test is whether the cause of action itself is one which affects property."

In the present case the cause of action did affect property. The principle *Actio Personalis Moritur Cum Persona* did not apply to the case of Executors and Administrators. His Lordship could not see any force in the contention that what was true in the case of Executors and Administrators could not be true in the case of heirs as such who did not require any letters of administration to the estate. Letters of administration are not necessary in the case of all successors and order 22 rule 3(1) of the Code of Civil Procedure lays down the rule as to how substitution in the case of the death of the plaintiff is to take place. In such a situation we think His Lordship was perfectly right in filling up the Lacuna in the Law by going to the substance of the matter and holding that what the Executor and Administrator as such could claim on the death of the plaintiff in the particular situation, the heirs also can.

S. C.

(1) (1887) L. R. 20 Q. B. D. (498-499).

## POSITION OF NATIVE STATES IN PUBLIC INTERNATIONAL LAW.

By

Mr. Sanjib Chaudhuri, M.A., B.L.

The Indian Native States seem to have a peculiar position in International Law. This position at the first sight seems enigmatic. At least it is not so clear as it ought to be. We shall try to explain this position in this contribution from the point of view of Public International Law.

There is little doubt that the world is progressing from Nationalism to Internationalism. There is equally little doubt that the general urge in politics is towards some extreme form of democracy. But these are factors of politics. They are not problems of positive law. Law is mostly a product of the past and Public International Law is not an exception to this. It has a history behind it apart from politics. It is on this history and on the principles generated by it that we shall base our enquiry.

None of the Indian Native States are buffer states though Nepal is treated as such between India and Upper Asia and Afghanistan is treated as such between India and the Middle East. But these are sovereign independent states, small though they are, and not native states. We have therefore nothing to do with them in the present enquiry.

Again, none of the Major States like Baroda, Hyderabad, Indore, Gwalior, Kashmir, Patiala are states that are entirely dependent on the British Commonwealth of Nations. It is futile to argue that the British Commonwealth of Nations is a dual state one current of its authority flowing through the King and another through the Parliament. With all its internal paraphernalia it is in Public International Law one single State under one Parliament with all the right, and obligation, not in the King but in the supreme democratic Parliament which governs not only the British Isles proper but the whole British Commonwealth of Nations. The Indian Native States are neither in Law nor in fact under the control of the Supreme British Parliament. The Public International Law recognises three kinds of States and no more. These are sovereign Independent States, Semi-sovereign Independent States and Dependent States. If the Major Indian States do not come under the class of Dependent States properly so-called, do they come under the denomination of Semi-sovereign States as defined by Public International Law?

The Indian Native States in our view are not semi-sovereign states. This will be clear from the fact that they enjoy some rights peculiar to the sovereignty both of the modern and of the old days. Thus

- a. They have their own sovereign Executive
- b. They have their own sovereign Legislature
- c. They have their own sovereign judicial system
- d. In the words of Mr. Wheaton, their existence is perpetually kept up by a constant succession of new members

e. They have a definitely demarcated boundary complete and perfect within which they exercise every major right of sovereignty so much so that each of the larger States may be called according to the Soviet Standard a Nation

f. Most of the larger states continue to enjoy Gun Salutes which is one of the clearest insignias of sovereignty and was so through centuries of history

g. When outside their Kingdom the supreme heads are immune from local jurisdiction like the heads of all fully sovereign States

h. They are not States duly Federated with Britain or with the British Commonwealth of nations or with British India nor has their sovereignty been separated or merged into any whole State like that of the United States of America. Their sovereignty is far better than the sovereignty of the old Germanic States, which inspite of Federation, had retained their distinctive characteristic of sovereignty

i. They can naturalise foreigners and can grant them their own domicile.

All the points mentioned above show that the Indian native states are sovereign from quite a number of points of view and all these points are elements that go to constitute sovereignty. We must here refer to the fact that the Public International Law does not make a clear-cut division of external and internal sovereignty. It nowhere says that a state having no external sovereignty will be a semi-sovereign State. For sovereignty is a concept referring to internal governmental organisation and there cannot be any external sovereignty properly so called for the simple reason that no sovereign state can be entirely sovereign or at all sovereign with regard to other sovereign states. Where a mutual status of equality is law, there no question of sovereignty other than that of the internal one could legitimately arise.

We must here enter into an examination of the concept of sovereignty as understood in Public International Law. Sovereignty is a positive conception. It denotes absolute power within the boundaries and connotes absence of a direct superior interfering whenever it will, not with this or that governmental function but with the Government as a whole. As we have already stated, the Public International Law makes no clear division of sovereignty into two parts that may be equally weighed, namely, external sovereignty and internal sovereignty. The Indian Native States



have no direct superior from the legislative, judicial or executive points of view. This position is made clearer by the British Government itself. Thus Jus Legationis is a right peculiar to sovereign states and the British Government maintain not consuls but residents who have a distinctive status in International Law to represent it in each of the major native states of India. These residents are 'watchers' and are never in law or custom a superior authority, though they sometimes exercise powers not peculiar to their position within these states and the states having a right to protest are not allowed the royal way to it. But this illegitimate nonallowance of the enjoyment of a particular right based on force or threat is, however, quite compatible with sovereignty in Public International Law. For, as we shall presently show, such limitations could not in international law affect the sovereignty of a state as such in the eye of Public International Law. A hundred years ago Hyderabad and Baroda were as independent as Sweden is to-day. Knowing as we do the history of the smaller states of Europe who have freely admitted limitations in their relations with their bigger neighbours during the whole of the nineteenth century and even later on, we must say that the kind of limitation imposed by the British Government on the Native States of India cannot in the least affect the sovereignty as such of most of the native States of India. We advisedly use the word '*most*' because with some of these states the British Government have some peculiar treaty relations which may be interpreted as abjuration of sovereignty according to Public International Law. The nature of the superiority exercised by the British on the major Native States is so qualified, imperfect and incomplete on account of the existing treaties that an impartial Court of International justice, not of course one like the Hague Court, which is British-ridden for all practical purposes, will at once find that sovereignty as understood in International Law remains absolutely unaffected by the exercise of such a species of superiority.

We must here enter into a little of history for the purpose of making our standpoint clearer. As early as the year 1493 the holy Pope of Rome granted a rescript to the Catholic European powers to occupy, possess and own the states and countries outside Europe. Encouraged by this grant some adventurous European powers sent emissaries outside to the other continents of the world and occupied, possessed and owned various parts, provinces and states of Asia, Africa and of the oceans. But neither the British nor the French who were sometimes predominant in India ever occupied,

possessed or owned any of the Indian Native States and thus acquired by any grant or prescription any legitimate right on the soils of the States. Without such formal steps as are necessary according to International Law, that is, without actual occupation, possession or ownership, there could possibly arise no prescriptive right on the part of the British State on any of the native states of India. What is worse the British State cannot even prove what is called symbolic possession. Where, therefore, Treaty rights yield none, the British Government's exercise of certain powers over the Native States cannot be interpreted as in any way affecting in international law the sovereignty of the Indian Native States. Most of the Native States, therefore, retain according to the principles of Public International Law as much of their sovereignty as they had before their unlucky contact with the western power which, being placed on a better scientific foundation, has surreptitiously been trying to usurp it. The powers exercised are by their very nature anomalous and unwarranted and are not likely to be looked upon as just and fair by a court of international justice fully conversant with the principles and precedents of Public International Law. As the word Semi means half and as the Indian Native States have not parted with half their sovereignty in the international sense of the term or in any other proper sense, the States retain their sovereignty in international law although, to speak in the words of law, a *cloud* has been thrown over it.

We shall now examine one after another the peculiar powers exercised by the sovereign independent State of Britain, or rather and to be more accurate, by some officials of the British Commonwealth on the native states of India, who have tried to play ducks and drakes with the treaty rights of the States for arrogating powers which can hardly be called legitimate. Not very long ago the Government of India made a declaration that "the principles of international law have no bearing upon the relation between the British States and the Native States under the suzerainty of the British King." We have already shown that no such suzerainty exists either *de facto* or *de jure*. No element constituting suzerainty has been duly surrendered by any major native state to the British King as such by any formal treaty or has been acquired by cession or prescription which are two of the legitimate methods for the acquisition of sovereignty. So that a mere onesided declaration by the Government of India that such high and universally recognised principles of Public International Law shall not apply with regard to the Indian Native States, some of whom have areas

greater than Britain and traditions no less glorious of valour and heroism, can at best excite laughter in persons with an international outlook of law, order and justice. Such a step has neither principle nor precedent, to support it. Neither the declaration of the holy Pope of 1493 nor the declaration of the Government of India could therefore in any way affect the position of any of the Native States in International Law. If the British State had a mind to acquire sovereignty over the Native States they could do so in any of the ways recognised by International Law. The plain fact is that this has not been duly done and their position remains the same only with a veil or cloud to cover it as long as there is no fair court of International Justice or as long as the British do not quit British India.

Let us now take up the powers exercised by the British Commonwealth of Nations on the Native States of India for examination and see in the light of precedents whether they are compatible with the retention of sovereignty by these native states. These powers are as follows :—

(1) The British Commonwealth does not allow the Native States to contract treaty with one another, though it vaunts before the world that it is not an empire but a Commonwealth of Nations.

(2) The British Commonwealth of Nations does not allow the Indian Native States to enter into treaties with other sovereign States like Afghanistan, Persia, France or Germany.

(3) The British Commonwealth of Nations does not allow Jus Legationis to the Indian Native States in their mutual relations as also in their relation with other sovereign independent states like France, Italy, Nepal or Afghanistan.

(4) The British Commonwealth of Nations or rather some of their officers under colour of authority compel the sovereign heads of the Indian Native States to attend Durbars or Assemblies held in honour of the supreme head of this Commonwealth or its representatives.

(5) The British Viceroy sometimes exercises a right of deposition or advice to abdicate with regard to the supreme head of a Native State.

(6) Some of the Native States, though not all, pay some tribute to the British State.

The first point may easily be referred to Policy. In Public International Law it is allowed as between sovereign Independent States for what is called Balance of Power and also for solving some

complicated problems of contingent danger. There is little doubt that the restraint on the States was due to contingent danger. Again, if a big power by some form of threat does not allow the smaller neighbouring powers to enter into treaties as among themselves or with other powers due to some contingent danger of which it is itself afraid, it is an arrangement born of expediency and cannot amount to any exercise of a right of sovereignty or suzerainty. Such arrangements made with the consent of smaller sovereign states cannot detract from their position as sovereign Independent States. They may be in the interest of the greater power or to the advantage of the smaller ones. But they cannot affect their sovereignty which is composed of various strong elements referred heretofore as existing in the Indian Native States to their fullest extent.

The second point falls exactly on the same ground. A mutual arrangement not to enter into treaties with powers other than the British cannot affect the sovereignty of the States clearly recognised as Independent in the Treaties made with them at the time of or at the conclusion of a war or a political situation. Let us make this clear with a hypothetical example. Sweden, Belgium and Denmark are smaller sovereign states and France is a greater one. If France for expediency imposes a condition on any one of them not to contract a Treaty with Russia which is a little further off and the smaller power does for the purpose of avoiding an impending war on it by France agrees to it, will the sovereignty of the smaller power be affected in the eye of International Law? The simple answer from precedents and customs is that it will not be so affected. The sovereignty of the smaller state will remain unaffected. It goes without saying that States like Hyderabad, Baroda and Gwalior are greater in area and population than most of the smaller European Powers and their position in International Law cannot nowadays be taken as affected by such limitations. A mere limitation of power unrecognised by other sovereign independent states has no value in Public International Law except as to the additional right thus acquired which may sometimes be recognised. It cannot affect the sovereignty of the State as such. In the case of the Indian Native States it has further been recognised in the Government of India Act of 1935 that they have a distinct right either to join the Indian Federation or to remain as they are. The British suzerainty over them which has not been acquired by any legitimate method recognised in International Law is of course verbally asserted although such assertion is not likely to be of

much value in the eye of Public International Law. Moreover by treaties, capitulations, grants, usage and sufferance the British State or as they call it now the British Commonwealth of Nations has jurisdiction in diverse foreign countries and not alone within the bounds of India. This has not in any way affected the position of the foreign countries concerned in Public International Law with regard to their sovereignty in the family of nations composing mankind, whether such countries are big or small.

The fourth point is far less indicative of any surrender of sovereignty on the part of the States. A Durbar is a formal affair and attendance to it cannot generate any right in any state on the point of sovereignty. A step in mere courtesy cannot be interpreted as submission and to the credit of the Indian Native States it may be said that at least one valiant Sovereign refused even this courtesy to a British monarch in the course of one such Durbar. Moreover a State Durbar is a function in which representatives of European or American foreign states may be invited. If such invitations were interpreted as indicative of political submission most states may consider twice before they send a representative. The supreme head of the State will of course refuse to attend under some plea or another. It need hardly be said that International Law will set very little value to attendance caused by illegitimate pressure in the face of the salutes which the states receive as their due on account of their position as sovereign states within the subcontinent of India.

The right to depose exercised at times by the British representative of the Government of British India is a mere act of the exercise of illegitimate force on the part of neighbouring power and is as such absolutely unsustainable in International Law. The states submit to it partly out of fear of aggression, partly on account of a sense of shame. The deposition of Nabha brought India-wide chorus of protest and the deposition of the Holker and the threatened deposition of the Maharaja of Kashmir in the early twenties of this century on moral considerations were submitted to from a sense of shame. Such submission does not affect the position of native states in general or of any individual native state in the eye of International Law. It may be pointed out as a precedent that several European powers interfered in the internal affairs of Turkey on the ground of unchristian conduct and inhuman treatment of subjects and ultimately divided the Turkish State carving Rumania, Servia and Bulgaria out of it and still the sovereignty of Turkey was untouched. A power to depose exercised by

no treaty but submitted to on account of a great contingent danger to the people of the state in the interest of the state itself on one particular occasion and this, too, not without protest, cannot amount to any surrender of sovereignty in Public International Law. Such depositions have been more common in European countries during the first half of the 20th century than anywhere else. They have, however, nowhere affected sovereignty of the country in International Law. The sixth point is easily challenged. Payment of tribute cannot affect sovereignty. Tibet pays annual tribute to Nepal as required by the terms of a treaty and this did not affect her position as a sovereign independent state. In fact she declared war against Nepal as independent sovereign state in 1929 though ultimately she had to apologise and pay a reparation.

On the background of the facts and situations set forth herein it will easily appear that the position of the Native States has not been affected according to Public International Law by the unwarranted steps taken by the Government of British India acting under advice or suggestion from some Executive heads of the British State. The sovereignty of the States that have not formally surrendered it by treaty or other legitimate means remains where it is. The Public International Law recognises after the law of the Romans the doctrine of *Postlimini* in several cases. So that if the Quit India or the Quit Asia cry succeed, the Indian Native States will be perfectly entitled to throw overboard all the limitations introduced by byelaws on some of their powers by the superior neighbouring British State. The cloud thrown on their sovereignty, which in substance remains unaffected, will then be gone and they will be able to stand on their own legs as supreme *de facto* and *de jure* heads of some absolutely sovereign states without any limitation to their power, position and authority as such.

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## Topical Titbits.

### Constitution.

Is there anything in a Constitution ? The question requires an answer even in this intelligent age.

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We find three kinds of constitution in the modern world monarchical, democratic and communistic. The question often is which is the best and the most suited to the time ? Which will maintain and help forward the progress of humanity as a whole with the least possible friction ?

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Our answer to the question is simple. There is much in independence but little in constitution as such. Experience of world politics during the present half of the twentieth century has taught us this.

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Without independence a nation cannot grow. But without a constitution, laborious and longwinding, it can. If there be an independent benevolent monarchy it can do much more for the country than a democracy full of cliques and quarrels. If there be a good and honest democracy with wider views of life and things, it can do much more for the people than a communistic constitution like that of Russia installed through blood.

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We shall illustrate what we say. During the reign of the great Queen Victoria even we Indians felt that a benevolent monarch was behind the autocratic constitution of India. People were not at all unhappy but praised British rule as something excellent. We have had a much better constitution in our Legislative Assemblies and in our corporations and municipalities. Have we in any way been the happier for it ? People who bless the British rule of the good Queen Victoria are freely cursing the British rule of the

modern times. And the cry of Quit India has reached all the corners of the globe.

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The truth is that the world is more busy about building constitutions than about building individual character. Men are running after frameworks without paying attention to heartwork. Politics is the order of the day even with boys in their teens and not having moral equipment on which alone a political framework monarchical, democratic, or communistic can healthily stand.

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The result has been disastrous. Discipline both from individual life and group life is vanishing. The administrations everywhere are corrupted and people are evading law both national and international. Wars have come to be recurring and national leaders misleading nations are bringing havoc among mankind over and over again. It is our firm belief that no particular country or party was responsible for the last six years' war. It was some leaders shrewd, vain and selfish, of all the principal nations who by their unseen ways and uncouth manouvres, invited this catastrophe to the society of men and thus brought ruin in a ruthless manner upon the whole world.

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Near about us we saw the Bengal constitution at work. We also see the constitution of the Calcutta Corporation. Our honest opinion is that the word Corruption could be writ large on the forehead of both or rather as a motto on both the Writers Building and the Building of the Calcutta Corporation. Both the ministries that have fallen were utterly corrupt and as for the gigantic depot of corruption having the fate of four million people within its grasp its present resolve seems to be

"Man may come and man may go"

But I go on for ever

in my own line of Corruption.

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The truth is that no constitution can save any nation for any length of time unless the authorities devise effective means for improving character through education of the right type: Science and political doctrines have taken us far wrong. Law and education alone will save. And by law we do not simply mean legislative enactments. We mean by it discipline on life not only on the national life as a whole but also on the individual life also.



### End of Law

What is the end or object of law? Or in other words why does law exist?

A judge or a practising lawyer will at once reply 'Why, to administer justice. Who could administer justice without law and how could society stand without such administration?

The jurists, however, have gone deeper into the problem. They have examined the concept of justice and have found that in human history justice has varied under different circumstances and different situations of social facts. Justice itself is something variable so that the object of law or the end of law taken as a whole cannot be mere administration of justice. Law is an institution and has other ends also in view.

There was a time when law was taken as existing to keep the peace. In society based on kinship such a conception was useful and sufficient. Later on with the growth of society the end of law was to maintain the status quo. For merely keeping the peace was not sufficient when human interests, claims and desires became more numerous. Then came the theory, that law existed for protecting 'maximum selfassertion of the individual'. This is what is called the political theory of law which received its expression in the famous French Revolution. It reigned supreme till the end of the nineteenth century during this period when *Laissez fair* was the cry of the day. But this is not the modern conception of the end of law. The modern conception, as the famous American jurist Roscoe Pound puts it, is this 'Law is a social institution to satisfy social wants—the claims and demands involved in the existence of civilised society—by giving effect to as much as we may, with the least sacrifice, so far as such wants may be satisfied or such claims given effect to by an ordering of human conduct through politically organised society' (Introduction to the Philosophy of Law—Page 99).

This definition or delimitation of the end of law is the most modern. It is also the most dynamic. We are afraid, however, that this too, is not sufficiently comprehensive. For law still

keeps the peace, it still maintains the status quo. It still delimits individual selfassertion. And now that with the advance of science, industry and means of communication, social wants, 'claims and demands and their control and delimitation loom large before our eyes and are facts which law as a social institution must take into consideration, it must take unto itself the problem of controlling and adjusting and encouraging human wants, claims and demands, as they are. It is not that one end of law of one age is eliminating another end of law of another age. But that by a functional attitude all the ends must be assimilated and adjusted from time to time into an end which is at once more comprehensive and more dynamic.

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The end of law is not therefore merely to administer justice. There can be no such permanent and stable postulate. Whatever the Law for the age and for the time being may be, the end of law is the due adjustment and delimitation of interest, wants, claims, and demands both of the individuals and of society so as to further the cause of the civilisation of the day.

### Trust:

Are there any essential requirements for the creation of a valid Trust? There are and Sir Lancelot Sanderson lays them down in the famous case of *Patel v. Jnan Chandra* (1).

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Says his Lordship 'In the first place it is material to ascertain the author or authors of the trust. Next the intention to create a trust must be indicated by words or acts with reasonable certainty. The purpose of the trust, the trust property, and the beneficiaries must be indicated and in such a way that the trust could be administered by the Court if the occasion arose'.

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All this is true. A trust, that is vague, in material particulars, cannot be enforced in law. But suppose the purpose of the trust is generally vague but is found to be reasonably ascertainable so far as one particular object is concerned. Other things being in form and all right, can such a trust be partially enforced? In

(1) (1935) 61 C. L. J. 285 (1935) 10 Cal. 2d 281 (1935) 10 Cal. 2d 281

the famous *Kayastha Pathshala* case their Lordships of the Judicial Committee held that the ascertainable portion of the trust can be enforced in law. The limited intention of the author of the trust is, in such cases, specifically given effect to on account of its being specific, although the rest of the trust may fail and have no effect in law whatsoever.

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Now, suppose, the trust is not a formal one but one that arises out of a contract or a constitution, as it was held to arise in the famous case of the *All India Spinners Association v. Commissioner of Income Tax, Bombay* (1) How do we find here the element of 'intention'? In such cases, we presume, the intention is not to be found but to be gathered from the constitution or the contract. Thus if three men sit together, make rules for establishing and for conducting a school with joint funds and public subscription and actually construct the school building for the public, equity and equitable considerations will make the school a public school and the building a public building. A member of the public, whether he has paid the subscription or not, will have right to pray for a declaration that the school is a public institution if the public interest suffers by any encroachment due to any private interference. But where is the essential intention of raising such a trust? It cannot be found in any formal deed. It cannot be directly seen in the contract. It must be gathered in such a case from the common purpose for which the contract or constitution was made. The intention is in the purpose, though it is not coeval with it.

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Thus the trust law, as it is, stands modified at this date at these two points, namely, that a Trust may be partially enforced if it is specific enough. And secondly the intention so essential for the creation of a trust whether express, implied, may in the case of contracts and constitutions be read in the purpose of the contract or the constitution. Their Lordships of the Judicial Committee apparently adopted this theory for intention when they held that trust or legal obligation in favour of the public and for public utility arose from the constitution of the *All India Spinners Association of Bombay*.

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(1) (1945) I. L. R. Bom. 153.

**Dr. S. C. Basak.**

In the death of Dr. Saratchandra Basak the Calcutta Bar has lost one of its most brilliant luminaries. Born of one of the ordinary families of Bengal this highly talented figure rose to the topmost ladder of High Court practice by sheer merit and industry. He was enrolled as vakil in 1900 and practised in the High Court for full fortyfive years with unequalled success, ability and honour. His scholarship was vast, his method was extremely fair and his intelligence was extremely fine. He was an unwavering fighter, an unfailing friend and by his death the Calcutta Bar is distinctly poorer. We offer our sincerest condolence to the members of his family. May his soul rest in peace!

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**Sir Rupendra Coomer Mitter, Kt.**

We congratulate Mr. Justice R. C. Mitter on the knighthood recently conferred on him by His Majesty the King. Frank by habit, honest to the core, bold, penetrating and industrious this great personality has adorned the High Court Bench for good many years. We have hardly met a brain so full of legal maxims and decisions and so powerful in analytic vision which is essential for administering justice under the British system. We wish him more glories in years to come. For we are confident that he richly deserves them by sheer merit and by his unfailing devotion to the high duties that he daily performs. We can assure His Lordship that the whole Calcutta Bar has absolute confidence in his scholarship, ability and courage, and will have it as long as he adorns the Bench with his towering personality. We feel honoured by the honour so fitly conferred upon him.

S. C.